



TC02360

Appeal number: TC/11/10254

INCOME TAX – Penalties for late payment of PAYE – whether reasonable excuse – no – whether penalty proportionate – yes – applicable penalty rate reduced to 3% and penalty reduced from £22,106.56 to £14,741.10 as number of defaults less than ten – Appeal allowed in part.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MACKINTOSH LIMITED

Appellant

- and -

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

**TRIBUNAL: JUDGE W RUTHVEN GEMMELL, WS
Member: IAN M P CONDIE, CA**

**Sitting in public at George House, 126 George Street, Edinburgh on
31 October 2012**

David Gordon, Cook & Co, Accountants, for the Appellant

**Elizabeth McIntyre, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

DECISION

Introduction

1. This is an Appeal by Mackintosh Limited (“M”) against a penalty determination issued by HM Customs and Revenue (“HMRC”) for the late payment of PAYE for the tax year 2010-2011.

2. Following the case of *HMRC v Agar* when the Tribunal ruled that the payment due in April 2011 should not be treated for the purposes of late payment penalties as a default during the tax year 2010-2011, the recalculated penalty charge at 5 April 2011 amounted to £22,106.26, being at the rate of 4% of the total amount of tax due in terms of the Finance Act 2009, Schedule 56, paragraph 6(7).

Legislation

Finance Act 2009 Section 107 (as amended by the Finance (No.3) Act 2010)

Schedule 56

Penalty for Failure to Make Payments on Time

Penalty for failure to pay tax

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(1) A penalty is payable by a person (“P”) where P fails to pay an amount of tax specified in column 3 of the Table below on or before the date specified in column 4.

(2) Paragraphs 3 to 8 set out—

(a) the circumstances in which a penalty is payable, and

(b) subject to paragraph 9, the amount of the penalty.

(3) If P's failure falls within more than one provision of this Schedule, P is liable to a penalty under each of those provisions.

(4) In the following provisions of this Schedule, the “penalty date”, in relation to an amount of tax, means the date on which a penalty is first payable for failing to pay the amount (that is to say, the day after the date specified in or for the purposes of column 4 of the Table).

	<i>Tax to which payment relates</i>	<i>Amount of tax payable</i>	<i>Date after which penalty is incurred</i>
<i>PRINCIPAL AMOUNTS</i>			
1	Income tax or capital gains tax	Amount payable under section 59B(3) or (4) of TMA 1970	The date falling 30 days after the date specified in section 59B(3) or (4) of TMA 1970 as the date by which the amount must be paid
2	Income tax	Amount payable under PAYE regulations . . .	The date determined by or under PAYE regulations as the date by which the amount must be paid

Amount of penalty: PAYE and CIS amounts

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5 (1) Paragraphs 6 to 8 apply in the case of a payment of tax falling within item 2 or 4 in the Table.

(2) But those paragraphs do not apply in the case of a payment mentioned in paragraph 3(1)(b) or (c).

10 **6**

(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

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

(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—

- 20 (a) a payment under PAYE regulations;
- (b) a payment of earnings-related contributions within the meaning of the Social Security (Contributions) Regulations 2001 (SI 2001/1004);
- 25 (c) a payment due under the Income Tax (Construction Industry Scheme) Regulations 2005 (SI 2005/2045);

(d) a repayment in respect of a student loan due under the Education (Student Loans) (Repayments) Regulations 2009 (SI 2009/470) or the Education (Student Loans) (Repayments) Regulations (Northern Ireland) 2000 (SR 2000 No 121).

5 (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.

10 (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.

(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.

15 (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.

(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.

20 (8) For the purposes of this paragraph—

(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.

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.]

30 **Cases referred to**

Energys Holdings UK Limited v The Commissioners for Her Majesty's Revenue and Customs [2010] UKFTT 20 TC

35 *Anthony Leachman v The Commissioners for Her Majesty's Revenue and Customs* [2011] UKFTT 261 TC

Hok Limited v The Commissioners for Her Majesty's Revenue and Customs [2011] UKFTT 433 TC

HMD Response International v The Commissioners for Her Majesty's Revenue and Customs [2011] UKFTT 472 TC

5 *Total Technology (Engineering) Limited v The Commissioners for Her Majesty's Revenue and Customs* [2011] UKFTT 473 TC

Stone Manor Hotels Limited v The Commissioners for Her Majesty's Revenue and Customs [2011] UKFTT 744 TC

10 *The Commissioners for Her Majesty's Revenue and Customs v Hok Limited* [2012] UKUT 363 TCC

The Facts

15 3. M is a manufacturer of raincoats and “mackintoshes” and whilst recording a profit in 2010-2011 incurred a substantial loss in 2008-2009 and a smaller loss in 2009-2010.

4. Evidence was submitted of each tax month's due payment date and the actual payment dates for the tax year 2010-2011 which showed a repeated pattern of late payments.

20 5. The due date for each payment was on the 19th day of each month which was the date for which a cheque for payment was prepared by M and was lodged a few days later. This was because M had taken the decision previously to always pay its monthly PAYE payments on receipt of a Notice P101(S), and this was its normal custom and practice.

25 6. This notice was always issued on or after the payment deadline had passed and, accordingly, the payments were late.

7. M put forward evidence that the payment due on 19 November was received by HMRC on 19 November although this would only have been possible if the cheque had been delivered the same day on which it was purportedly dated.

30 8. M produced evidence in the form of a company bank statement which showed that the cheque had cleared on 24 November and a calendar printout showed that 20 and 21 November occurred on a Saturday and Sunday in 2010.

35 9. HMRC confirmed that when they calculated whether a payment was late or not they used a period of three days for a cheque to clear from the date of the bank lodged payment.

10. In relation to the November payment, the bank lodged payment date was 22 November and so HMRC worked on the basis that the cheque would have been received by them on Saturday 20 November.

11. The significance of this was if the November late payment is included, the total number of payments amounted to ten which incurs a 4% charge and, if it was made on time, there would be nine defaults which would incur a 3% charge.
12. M referred to their letter of 8 August 2011 when they explained that M's financial controller, Mr Burnett, who had been in his post for many years and is responsible for lodging the monthly PAYE payments, always prepared a cheque on the 19th of each month and lodged it a few days later prompted by the issue of a HMRC Notice P101(S).
13. Mr Burnett who was at the hearing confirmed this was his procedure and that he treated payment of PAYE like any other creditor and paid on receipt of a demand.
14. Reference was made to a P101(S) being a notice requiring payment dated 27 May 2010 which states, amongst other things, that PAYE is overdue and that it must be paid within seven days. It goes on to say that if the taxpayer does not do so, the specified amount may be recovered without further warning either by placing collection in the hands of the Sheriff Officer or by proceedings in Court. This notice makes no reference to penalties.
15. HMRC provided evidence that verbal warnings had been given during telephone conversations with Mr Burnett on 26 May 2010 and 26 October 2010 and that a letter was issued on 28 May 2010, being a computer generated letter, warning M that it appeared not to have paid its PAYE on time and advising that "they may be liable to a penalty if you pay late more than once in a tax year". At that time, however, no penalty was due as no penalty is levied on the first late payment.
16. The letter goes on to state that "if M were unable to pay on time they should contact HMRC before the payment date and in the event that a Time to Pay Agreement had been made with HMRC then no penalties would be charged from the date that M approached HMRC".
17. In respect of the payment of 19 May, HMRC's summary of contacts with M referred to a telephone call with Mr Burnett on 26 May 2010 which consisted of a reminder of payment dates, a warning of penalties and a note that payment was received on 27 May 2010 in relation to a P101(S) issued on 27 May 2010.
18. Reference was also made to a "previous action pertinent to the penalty prior to the penalty year", being a summary of a telephone call on 24 August 2010, in which Mr Burnett refused to agree to make further payments on time as he said "he always pays on 25th even although in fact it would be possible for him to change. Warned legal action".
19. HMRC's publications, including the Employer Bulletin issued in September 2009, gave advice on how to avoid penalties, stated clearly the dates by which payment should be made and also provided advice that if a business was unable to pay tax on time that they should tell HMRC as soon as possible.

20. Reference was also made to HMRC's publicity for the penalty regime by way of CD-rom, their website, and "Agent updates", which M's agent, Mr Gordon, confirmed his firm would have received over the periods August 2009 to January 2010 and April 2010 to March 2011, all of which made reference to PAYE late payment penalties.

21. The extract from HMRC's websites entitled "How to Pay PAYE/Class 1 National Insurance Contributions" was submitted, as well as the HMRC Budget 2009 press release.

22. On 8 August 2011, M appealed to HMRC on the grounds that they had a reasonable excuse for the late payment.

23. HMRC replied on 23 August 2011, stating that they did not accept the reasons set out by M as a reasonable excuse; that the due dates for payments means 19th or 22nd as appropriate and not a day or two afterwards; that employers are supposed to pay on time without warnings; that their website provides full information on the penalties and methods of payments and that if there had been difficulties in paying on time there was a process for dealing with this which may have resulted in penalties not being charged.

24. HMRC continued that they were not required to send out default warning letters and only did so as a customer service; that one of these letters had been sent on 28 May 2010 and that verbal warnings had been given during telephone conversations on 26 May 2010 and on 26 October 2010.

25. HMRC offered an internal review which was dealt with by a decision letter dated 7 November 2011 which, in large part, repeated the terms of the letter of 23 August 2011, already referred to, stating that HMRC did not believe the decision was unfair (in terms of the *Total Technology (Engineering) Limited* case), that they did not believe the penalty was disproportionate and whilst acknowledging that business conditions were difficult, M should have contacted the Business Payment Support Service to request a deferment of the payment.

26. The internal Appeal upheld the penalty charge.

30 **M's Submissions**

27. M say that they have a reasonable excuse, that the warnings given by HMRC were insufficient and that the P101(S) makes no mention of penalties which is contradictory to all the other publications issued by HMRC in relation to PAYE payments.

28. M say that the payments were as a result of a genuine mistake and refer to the *Leachman* decision where Judge Geraint Jones stated that "HMRC cannot argue that before a person can establish the reasonable excuse it must be established there are exceptional circumstances of some exceptional event, giving rise to the default".

29. He continued “I am entirely satisfied that as a matter of law a mistake of fact is capable of amounting to a reasonable excuse. It may not amount to an exceptional event but for reasons which I have set out above that is not a material consideration”.

5 30. M say that if the Tribunal do not accept that there is a reasonable excuse then the penalty is disproportionate.

31. They say that the payments were at most usually four days late and not 44 days late, yet the same penalty applies because the payments are just late.

10 32. M referred to *HMD Response International* where Judge Geraint Jones, whilst referring to an Employer’s Year End Return (a P35) stated that “manifestations of the State must act fairly and in good conscience with its citizens. In our judgement there is nothing fair or reasonable in setting a computer system so that it does not generate a penalty notice until four months have gone by from the date of default”.

15 33. M referred to the *Energys Holdings UK* case, in relation to a return submitted one day late because of an error in determining the correct date which resulted in a penalty of £131,881 and in which reference was made to the principle of proportionality applicable to national measures which are adopted by a member state in exercise of its powers.

20 34. The case refers to the statement by Lord Nicholls of Birkenhead who said “the legislation must not only have a legitimate policy objective, it must also satisfy a ‘proportionality’ test. The Court must decide whether the means employed by the statute to achieve the policy objective is appropriate and not disproportionate in its adverse effect”.

25 35. M referred to *Total Technology (Engineering) Limited* and to the application of proportionality where the Tribunal, carrying out a similar exercise in *Energys*, considered a five factor test.

36. M say that the penalty amounts to a high percentage of the company’s profits and that the penalty for making payments usually four days late each month is disproportionate and unfair.

30 37. M say the company has a good compliance record and that the default was, in applying these tests, “innocent and not deliberate”.

38. M state that the payment in November cleared, in terms of the Clydesdale Bank statements submitted to the Tribunal, on 24 November so that taking the days of 20 and 21 November as being Saturday and Sunday, then the cheque must have been received on 19 November which was the due payment date.

35 39. M state that they did not raise this in their appeal to HMRC and this matter only came to light in the preparation of their case before the Tribunal.

HMRC's Submissions

40. HMRC say that all the payments were received late, that an adjustment has already been made for the *Agar* decision so that the penalty amounts to £22,106.56 and represents a penalty rate of 4% because ten payments were late.

5 41. HMRC say that the November payment's bank lodgement date was on 22 November so working back from that they state that the payment was received on 20 November which was a day late.

42. HMRC say that M repeatedly geared their payment to receipt of the P101(S) form which they should not have done and, therefore, by making payment only on receipt of this form, their payments were late.

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43. HMRC do not accept the decision of *Total Technology* and state that none of the First-tier Tribunal decisions referred to are binding on this Tribunal.

44. In relation to the November payment, HMRC conceded that they assume that when a payment is lodged on Monday that was not lodged on the previous Friday, then it must be received on the previous Saturday.

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45. HMRC say sufficient warnings were given to M by telephone conversations and by a written letter and that, in any event, the whole system of PAYE late filing penalties was more than adequately explained to employers and agents.

46. HMRC say that M have no reasonable excuse as they had neither a lack of funds nor were relying on a third party; that M have admitted that all the payments were late and that it was their normal practice not to pay until receipt of the P101(S) which resulted in the late payments.

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47. HMRC say that the regime was introduced to counter the very behaviour of employers making late payment of PAYE and National Insurance which do not belong to the employers but to HM Treasury.

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48. HMRC say that the penalty is proportionate because it takes account of the amount of tax not paid on time and the number of defaults and this was made clear in the warning letter of 29 May 2010.

49. HMRC say they have no discretion to amend the penalties which are set out in statute and can only consider a reasonable excuse.

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Reasons for the decisions

50. The Tribunal noted the consistent late payment of PAYE by M caused almost entirely by the practice of M only paying PAYE on receipt of a P101(S) and not according to the widely publicised due payment dates, which incur penalties for failure to pay by those dates.

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51. The Tribunal considered the November payment as having been paid on 19 November on the basis of the evidence of the bank statement which showed the

cheque to have cleared on 24 November on the basis that if it took three days to clear and was lodged for payment on 22 November, it would have cleared on 25 November.

52. The Tribunal, also, noted that a payment received in May 2010 on 27 May was also the date on which the P101(S) was issued.

5 53. In view of this, the Tribunal consider that the number of late payments was reduced to nine and not ten and, accordingly, any penalty which was due (see below) should be at the level of 3%.

54. Prior to the hearing, the Tribunal had issued M and HMRC with the recently issued Upper Tribunal judgement, *The Commissioners for Her Majesty's Revenue and Customs v Hok Limited* which stated that the First-tier Tribunal had no jurisdiction to discharge a penalty on the grounds of unfairness and that HMRC's failure to send prompt reminders was not in any event unfair.

55. The Tribunal did not consider that the penalties for the late submission of PAYE payments were disproportionate.

15 56. The Tribunal felt that in fact the penalties were proportionate to the extent that they operated on an increasing ratchet basis determined by the number of defaults which was, in essence, proportionate.

57. The Tribunal felt that the issue of whether a payment was a day late or 40 days late was not disproportionate, if the intention was to tackle repeated failure and referred to HMRC's consultation issued on 19 June 2008 entitled "Modernising Powers, Deterrents and Safeguards" which stated that "penalties should escalate for repeated failure to discourage repeated failures for successive late filing and payment".

58. The Tribunal found that there was no reasonable excuse for late payment; that the penalty was not disproportionate; that issues of unfairness required to be raised with the Upper Tribunal and not this Tribunal and, accordingly, that the penalties should be assessed.

59. The Tribunal found that there were nine late payments in the absence of any evidence from HMRC to rebut the evidence of the cheque being cleared on 24 November when a three day clearing period is assumed and accepted by HMRC.

60. Accordingly, the Tribunal find that the penalties are due but that the sum payable is at a rate of 3% of the tax charged in terms of Schedule 56 of the Finance Act 2009, as amended, amounting to £14,741.10.

61. 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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**W RUTHVEN GEMMELL, WS
TRIBUNAL JUDGE**

RELEASE DATE: 8 November 2012

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