



TC02356

Appeal number: TC/2012/04037

TYPE OF TAX – appeal against the penalty imposed for the late payment of PAYE - Schedule 56 Finance Act 2009- whether the terminal illness of a director who was the sole signatory of the cheques for much of the relevant time and her ultimate death and previous serious eye infection which threatened her sight was a reasonable excuse for the late payment of the PAYE – yes for the first six months of the year- thereafter the appellant ought to have made alternative arrangements- appeal allowed in part

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

FOUR COLOURS PRINT SERVICES LTD

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE SANDY RADFORD
ANTHONY HUGHES**

Sitting in public at Bedford Square, London on 14 September 2012

Mr J. Winder for the Appellant

Mr J Kruyer, Officer of HMRC, for the Respondents

DECISION

1. This is an appeal against the penalty of £2,150.98 imposed for the late payment of PAYE in 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.

Background and facts

8. There were two directors of the appellant, Mrs Fisher and Mr Mackenzie and they split their duties.

5 9. Mrs Fisher, the former director of the appellant, was diagnosed with ovarian cancer in 2010. She tried to maintain a semblance of normality during this difficult period, coming to work as her treatment and wellbeing allowed until the latter stages when she became too ill to carry out her normal duties.

10 10. Mrs Fisher passed away on 31 March 2011. Prior to her diagnosis of cancer she had been ill for 11 months with an eye infection and the possibility arose that she might lose her eye.

11. After her cancer diagnosis Mrs Fisher sometimes worked at home and Mr Mackenzie, a director, was not aware of the terminal nature of her illness because Mrs Fisher was staying positive for the sake of her son and daughter who worked for the appellant.

15 12. Mr Mackenzie was appointed as a director in 2009 but because Mrs Fisher was ill with the severe eye infection she was unable to teach Mr Mackenzie about the appellant.

20 13. Whilst Mrs Fisher was so ill nothing continued as normal. Lee Fisher stayed with his mother as Mrs Fisher could not drive and had to be taken for her hospital visits for the eye infection.

14. Mr Mackenzie gave evidence that Mrs Fisher didn't ask for any help because she believed that she could cope. Mr Mackenzie had to deal with the production, solicit clients, process jobs, manage the staff and do all sorts of extra work.

25 15. In December 2010 Sam Fisher came to work for the appellant and was appointed as a director in April 2011. Although Sam Fisher helped she was a beginner and some things were overlooked. Once she had cleared the backlog it became possible for the appellant to pay on time.

16. The appellant had two visits from HMRC but because Mrs Fisher was working from home at the time she didn't understand the reason for HMRC's visit.

30 17. For a while Mrs Fisher was the only signatory to the cheques and was often not in the office to sign them.

18. The shareholders of the appellant were Mrs Fisher and Mr Mackenzie's father.

Appellant's submissions

35 19. Mr Winder submitted that it was very difficult to replace a person such as Mrs Fisher who had intimate and detailed knowledge of the appellant and that it was to be expected that some mistakes would happen in a transitional period.

20. He submitted that in accordance with paragraph 9 (1) of Schedule 56 HMRC could reduce the penalty if there were special circumstances. He contended that HMRC had not considered whether there were special circumstances and additionally that the appellant did have a reasonable excuse.

5 21. The payroll was outsourced for the whole period and cash flow was not a problem.

22. He submitted that HMRC ought to have considered whether there was a reasonable excuse for each and every period and should have asked more questions. Instead they dismissed the appellant's excuse on a broad brush basis.

10 **HMRC's submissions**

23. Mr Kruyer submitted that the serious illness of Mrs Fisher was not a reasonable excuse because there were two directors.

15 24. He submitted that all that was needed was knowledge of the due dates for payments of the PAYE and those were well-publicised in various Employer Bulletins and on HMRC website.

25. He submitted that the appellant ought to have contacted HMRC to tell them of the problem or to ask for a time to pay arrangement.

26. Whilst he accepted that Mrs Fisher's illness had caused delay in the previous tax year 2009/10 all the payments with the exception of two payments were made late.

20 27. He submitted that knowing the situation concerning Mrs Fisher's illness the appellant ought to have made alternative arrangements.

25 28. He submitted that as the appellant outsourced their payroll all they had to do was issue the cheque. The outsourcing of the calculation of wages and deductions indicated that no experience or knowledge of PAYE was required from the appellant to make payment other than the payment due dates which were widely publicised and easily available.

Findings

29. The Tribunal found Mr Mackenzie to be honest and truthful.

30 30. The Tribunal accepted that Mrs Fisher's untimely illness had placed a huge strain on the appellant. They also accepted Mr Mackenzie's evidence that Mrs Fisher had tried to keep the terminal nature of her illness hidden from her children and insisted that she could cope.

31. The Tribunal found that as she was the sole signatory of the cheques for some time it was difficult for them to be signed when she was not there.

32. Although HMRC confirmed that in the previous year the appellant had also paid late, the Tribunal found that during that year Mrs Fisher had been ill with an eye infection which was so serious that losing her eye became a possibility.

5 33. The Tribunal found therefore that these facts combined gave the appellant a reasonable excuse for the first six months of the year. Thereafter the Tribunal found that the appellant ought to have put alternative procedures in place.

Decision

34. The appeal is allowed in part and the penalty imposed in respect of the first six months of the tax year 2010/11 is hereby cancelled.

10 35. The appeal is dismissed in respect of months 7, 8, 9 and 10, with month 7 becoming the first default which of course does not count towards the penalty.

15 36. 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: 7 November 2012

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