



TC02382

Appeal number: TC/2012/06550

*PAYE – appeal against the penalty imposed for the late payment of PAYE-
Schedule 56 Finance Act 2009- appellant admitted paying late but claimed
penalty was disproportionate – Tribunal found that appellant had no
reasonable excuse – appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ST JOHN'S WESTMINSTER RTM CO LTD

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE SANDY RADFORD
MRS SHEILA CHEESMAN**

Sitting in public at Bedford Square, London on 18 September 2012

Mr Thornton, Managing Director of the Appellant, for the Appellant

Mrs G Orimoloye, Officer of HMRC, for the Respondents

DECISION

1. This is an appeal against the penalty of £3,173.55 for the late payment of PAYE
5 in 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
10 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 sub-
15 paragraphs (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. Mr Thornton is Managing Director of Hurford Salvie Car Property Management Ltd who act as property management agents and as part of this he is Company Secretary of the appellant.

5 9. He stated that although these were tough times HMRC had always been extremely helpful. The penalty however was out of the ordinary. He had replied to all the letters sent to him by HMRC but at no time had there been any mention of a penalty.

10. He admitted that the PAYE had been paid late.

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Appellant's submissions

11. Mr Thornton submitted that the warning letter received from HMRC in May 2010 had made no mention of a penalty and made it look as though any penalty imposed was at the discretion of HMRC.

15 12. Mr Thornton queried why the appellant had been selected on a risk assessed basis.

13. Mr Thornton submitted that he thought that bank transfers to HMRC would have happened instantaneously and that the requirement was to pay the PAYE within 7 days of the due date.

20 14. He submitted that the penalties were disproportionate to the default. The appellant had not paid very late but nevertheless were charged £3,172.55. This was not fair and equitable and he submitted that there ought to have been a transitional period before imposition of the penalty.

25 HMRC's submissions

15. Mrs Orimoloye submitted that the appellant had no reasonable excuse for the late payment of the PAYE.

16. She submitted that HMRC had no discretion as to the imposition of the penalty if the tax payer paid late, HMRC were obliged to impose the penalty.

30 17. She confirmed that in the first year of the penalty regime HMRC had targeted taxpayers who had a record of paying late and were the most persistent defaulters. This was what was meant by the selection of taxpayers on a risk-assessed basis.

18. She submitted that the initial warning letter stated that “the penalty may be charged” because it would not have been charged if the taxpayer had a reasonable excuse for the late payment.

5 19. She submitted that the amount of the penalty was set in the legislation contained within Schedule 56 and HMRC had no discretion to vary the penalty rate.

20. Mrs Orimoloye submitted lack of awareness of the penalty regime was not a special circumstance.

21. She referred to the case of *Sunset Travel Ltd* FTT6012 in which Judge Staker said

10 “lack of awareness of the penalty regime is not capable of constituting a special
circumstance; in any event no reasonable employer, aware generally of its
responsibilities to make timely payments of PAYE amounts due, could fail to have seen
and taken note of at least some of the information published and provided by HMRC...
15 any failure of the part of HMRC to issue warnings to defaulting taxpayers, whether in
respect of imposition of penalties or that fact of late payment, is not of itself capable of
amounting either to a reasonable excuse or special circumstances.”

22. Further she referred to the case of *McTear Contracts* UKFTT 857 (TC) in which Judge Gordon stated:

20 “the proportionality argument was not developed beyond the calculation of interest.
There is nothing in the legislation, evidence or in the submissions which enables us to
conclude that the penalty regime is disproportionate whatever the appellant’s
representative intended that much used word to mean. The penalty regime has been
enacted by Parliament in an area where it has a very wide discretion.”

25 **Findings**

23. We found that the appellant had no reasonable excuse for the late payment of its PAYE every month.

24. We found that although the appellant had claimed that it believed that payment was to be made within 7 days of the 19th of each month, ignorance of the law was not
30 an excuse.

25. We found that the appellant had a record of always paying late. We found that the penalty was required to be harsh in order to act as a deterrent but it was not unfair.

26. We found that the penalty increased progressively as the number of defaults increased and therefore it was within the appellant’s power to stop the penalty any
35 time by paying on time. We found that it was not disproportionate.

Decision

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

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.

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**SANDY RADFORD
TRIBUNAL JUDGE**

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RELEASE DATE: 26 November 2012