



TC02384

Appeal number: TC/2012/03120

*PAYE – appeal against the penalty imposed for the late payment of PAYE-
Schedule 56 Finance Act 2009 – whether a genuine belief that the PAYE
had been posted in time was a reasonable excuse – no – whether the lack of
a specific warning was a reasonable excuse – no – whether the penalty was
disproportionate or unfair – no – appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SOMETHING ELSE SOUND DIRECTIONS LIMITED Appellant

- and -

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

**TRIBUNAL: JUDGE SANDY RADFORD
MR JULIAN STAFFORD**

Sitting in public at Bedford Square, London on 20 September 2012

Mr Stuart Smith for the Appellant

Ms Karen Weare, Officer of HMRC, for the Respondents

DECISION

1. This is an appeal against the penalty of £17,582.81 imposed for the late payment
5 of PAYE in every month for the tax year 2010/11.

2. The penalty charged was originally £25,731.70 but as a result of the *Agar* case the penalty in respect of month 12 was removed.

The legislation

3. Penalties for the late payment of monthly PAYE amounts were first introduced
10 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.

4. Paragraph 6 (which relates only to employer taxes such as PAYE) states that the
15 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.

20 (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.

25 (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.

5. Under paragraph 11 of Schedule 56 HMRC is given no discretion over levying a penalty:

30 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.

35 (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 6. 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:

10 (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-

- (a) affirm HMRC's decision, or
- (b) substitute for HMRC's decision another decision that HMRC had the power to make.

15 (3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 9-

- (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.

20 7. Paragraph 9 (referred to in paragraph 15) states:

(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.

(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.

35 8. 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

9. The appellant is a media production company with 70 staff.

5 10. The appellant paid its PAYE late every month of the tax year 2010/11.

11. The PAYE was paid by cheque and posted to HMRC. Almost every month the cheques, copies of which were produced to the Tribunal, were dated on or after the 19th of the month which was the due date.

Appellant's submissions

10 12. Mr Smith submitted that the PAYE was on average transferred not more than a day late over the course of the year and he had assumed therefore that the PAYE payments had reached HMRC by the 19th of each month.

15 13. Mr Smith submitted that the appellant had not been informed that they had been late in paying their PAYE and would have expected a warning to be sent after the first quarter.

14. He referred to the case of *Anthony Leachman* [2011] UKFTT 261 (TC) in which Judge Jones stated that it was a reasonable excuse if an incorrect state of mind was held genuinely but mistakenly. He submitted that in the appellant's case it genuinely believed that the PAYE would reach HMRC by the due date.

20 15. He referred to the case of *N Dudley Electrical Contractors Ltd* [2011] UKFTT260 (TC) in which Judge Jones stated that whilst there was no obligation on HMRC to issue a reminder, it should be done timeously and well before any second penalty period began as a matter of common fairness and justice.

25 16. He also referred to the case of *Walton Kiddiwinks Private Day Nursery* [2011] UKFTT 479 (TC) in which the judge stated that the appellant was entitled to rely upon the common law duty of a public body to act fairly not just in its decision making process but also in administering its statutory powers.

30 17. He submitted that a penalty of 4% of the PAYE which had been paid late was wholly disproportionate to the default. It amounted to some 300% APR. He did not seem to realise that the penalty had in fact been reduced to 3%.

HMRC's submissions

18. Ms Weare submitted that as a result of the reduction in the penalty the rate had been reduced to 3%.

35 19. She submitted that the penalty had been imposed in accordance with the legislation.

20. She submitted that all the payments had been made by cheque and the cheque had been written each month on the 19th which made it impossible for the cheque to arrive on time.

5 21. Ms Weare submitted that the new regime had been very well publicised and so there was no reason for the appellant not to be aware of it.

22. She submitted that HMRC had made many calls to the appellant and had spoken to Roslyn Garth the company accountant.

23. She submitted that the penalty was not disproportionate as it increased progressively as the defaults increased.

10 24. She submitted that the cases cited by Mr Smith were cases decided in respect of a different type of penalty.

25. She submitted that the calculation of the penalty could only be made at the end of the year and HMRC had no obligation to issue a warning letter.

15 26. Ms Weare referred to the case *Agar* [2011] UKFTT 773 (TC) in which Judge Poole stated that

20 “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.”

27. She submitted that as a result of paragraph 11 (1) of Schedule 56 HMRC had no discretion to reduce the penalties. The appellant had in effect 9 defaults in the year and therefore had to pay a penalty rate of 3%.

25 28. **Findings**

29. The Tribunal found that the appellant had no reasonable excuse for the late payment of the PAYE. It had regularly paid late and seemed unaware of the effective due dates. Whilst Mr Smith claimed that he had assumed that the cheques reached HMRC on time and that this was his genuine mistaken belief, on checking the copy
30 cheques produced to the Tribunal, we found that the majority were dated on or after the due date which made it impossible for them to reach HMRC on time as they were posted.

35 30. We found that the *Leachman* case referred to a personal appellant and in this matter the appellant was a company and not Mr Smith personally. We were not provided with any evidence that the other persons involved in the company payroll had also held that mistaken belief.

31. We found that HMRC was not required to issue any warning letter and that any lack of such a specific warning letter did not qualify as a reasonable excuse for the late payment of the PAYE.

5 32. We found that the penalty was not disproportionate. We found that the penalty increased progressively with the number of defaults.

33. We found that ignorance of the law was not a reasonable excuse.

34. We found that *Leachman* and the other cases cited related to a different penalty and that the decisions in these cases have now been over-ruled by the Upper Tribunal in the case of *HMRC v Hok Ltd* [2012] UKUT 363 (TCC).

10 35. We found that there was considerable contact between HMRC and the appellant during the year when the question of penalties was raised and that there was considerable publicity beforehand. We therefore found no unfairness.

Decision

15 36. The appeal is dismissed and the penalties are hereby confirmed

37. 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