



TC02385

Appeal number: TC/2012/06610

*PAYE – appeal against the penalty imposed for the late payment of PAYE-
Schedule 56 Finance Act 2009 – appellant claimed postal delays – Tribunal
found this not to be a reasonable excuse – was the penalty unfair – no-
appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ABOUZAKI HOLDINGS CO LTD

Appellant

- and -

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

**TRIBUNAL: JUDGE SANDY RADFORD
MR SIMON BIRD**

Sitting in public at Cardiff on 8 October 2012

Mr Stephen Arthur of Martin F Arthur accountants for the Appellant

Mr Peter Massey, Officer of HMRC, for the Respondents

DECISION

1. This is an appeal against the penalty of £10,619.19 imposed for the late payment of PAYE during tax year 2010/11. The appellant had 6 defaults during the year which counted towards the penalty.

2. The original penalty included two further defaults in respect of months 5 and 6 but these were removed on review.

The legislation

3. 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.

4. 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.

5. 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 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 –

- 25 (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-

- 30 (a) staying a penalty, and
- (b) agreeing a compromise in relation to proceedings for a penalty.

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

5 9. The appellant consistently made its PAYE payments late. On checking the dates of the cheques it appeared that very often they were dated on or after the due date. The cheques were sent to HMRC by post.

10. A warning letter was sent to the appellant in May 2010. The appellant claimed not to have received it.

10 11. After receiving the penalty notice the appellant requested a review claiming that months 5, 6, 7 and 8 had been sent on time.

12. The HMRC reviewing officer removed two of the default months from the penalty charge. She refused to do so however in respect of months 7 and 8. Month 7 being four days late and month 8 being eight days late.

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Appellant's submissions

13. The appellant submitted that it had not received any warning letter.

14. The appellant submitted that none of the publicity concerning the new penalty regime had been brought to its attention. In particular it submitted that its accountants
20 had good knowledge of such matters but had not informed them.

15. The appellant submitted that the payments had been posted on time and any delays in their receipt by HMRC must have been due to postal delays.

16. The appellant referred to recent First-tier Tribunal cases in which it had been decided that certain penalties were unfair to the taxpayer.

25 17. Mr Arthur submitted that there were always funds available to pay but sometimes one signatory to the cheque was away from the office. Two signatories were required for cheques over £10,000 and additionally the appellant had had staff shortages.

30 18. Mr Arthur submitted that HMRC were using their powers to collect revenue as opposed to penalising genuine late payers.

HMRC's Submissions

19. HMRC submitted that the new penalty regime had been well publicised and so there was no reason for the appellant to be unaware of it

20. Mr Massey produced a list of the dates of the PAYE cheques. As the cheques for months 5 and 6 were dated 14 September 2009 the reviewing officer had allowed them but month 7 had been dated 18 November and not received until 9 days later.

21. He referred to the staff shortages and stated that the appellant was not a small company as its PAYE bill was some £1.4 million. He also queried why there were only two signatories for cheques when there were five directors. In any event he submitted that the appellant knew when the cheques were required and should have made alternative arrangements.

Findings

22. We found that the appellant had no reasonable excuse for the late payments of the PAYE. The cheque dates showed that the appellant regularly left the preparation of the cheques to the last moment and did not allow three working days for them to reach HMRC if posted.

23. We found that being aware of the necessity to pay the PAYE the appellant ought to have made alternative arrangements for the signing of the cheques if one of the signatories was to be away.

24. We found that the appellant had been sent a warning letter and the new regime had been well publicised.

25. We found that in the recent appeal to the Upper Tribunal by HMRC in the case of *Hok Limited*, the Upper Tribunal found that Judge Jones's finding in the First Tier Tribunal, that HMRC's failure to send a prompt reminder was unfair, was unsustainable and allowed HMRC's appeal. In its decision the Upper Tribunal stated at paragraph 36 that:

“it is plain that the First-tier Tribunal has no *statutory* power to discharge, or adjust, a penalty because of a perception that it is unfair”.

26. For the above reasons we found that the penalty was correctly imposed.

Decision

27. The appeal is dismissed.

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**

RELEASE DATE: 26 November 2012