



TC02386

Appeal number: TC/2012/06298

*PAYE – appeal against the penalty imposed for the late payment of PAYE-
Schedule 56 Finance Act 2009 – whether penalty disproportionate – no –
whether fact that appellant had to wait for money from its head office in
Italy was a reasonable excuse- yes initially – appeal allowed in part in
respect of months 2 and 3*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

FRANCO VAGO UK LIMITED

Appellant

- and -

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

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

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

Mr J Earle, Managing Director of the Appellant, for the Appellant

Mrs G Orimoloye, Officer of HMRC, for the Respondents

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DECISION

1. This is an appeal against the penalty of £4,646.19 imposed for the late payment of PAYE for months 2-12 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 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. Mr Earle is managing director of the appellant which is a freight forwarding company whose head office is in Italy.

5 9. He stated that the appellant was reliant on receiving funds from its head office as it was in financial difficulties and could only survive with the benefit of these funds.

10. The appellant's accountants paid the salaries and provided the appellant with payslips which showed the amount of PAYE due.

10 11. A warning letter was issued to the appellant but it went to the accountants. Mr Earle stated that the appellant was completely unaware of the penalty which was arising as a result of the late payments. Any conversations which it had with HMRC were always queries as to when the PAYE would be paid.

12. In any event he stated that the appellant could not pay until money was received from Italy.

15 13. HMRC's records showed that the appellant was phoned on several occasions when messages had been left, on one occasion on an answer phone. Additionally HMRC had spoken to Mr Earle and Mr Francis, directors, and to Mr Newman, the accounts manager and warned of legal action and penalties.

20 14. Mr Earle confirmed that the appellant's accountants, Bruce Allen, who were chartered accountants had not warned the appellant about the penalty.

Appellant's submissions

15. Mr Earle submitted that the appellant was completely unaware of the problem. The problem was left for far too long without anyone informing them.

25 16. Mr Earle submitted that although HMRC had stated that they had left messages on the answer phone, the appellant did not have an answer phone.

17. He submitted that the amount of the penalty was disproportionate to the default and HMRC had a duty of care to inform the appellant.

30 18. He submitted that because of the nature of its business there was always someone to answer the appellant's telephone from 7am to 6pm. He therefore disputed that HMRC had telephoned on several occasions and left messages for someone to call back.

19. Mr Earle submitted that all businesses closed down over Christmas in Italy and therefore the money for the PAYE and salaries had been particularly late that month.

HMRC's submissions

20. Mrs Orimoloye submitted that HMRC had spoken to Mr Newman who was the appellant's accounts manager.
- 5 21. She submitted that ever since the imposition of the penalty the appellant had paid on time.
22. She submitted that no mitigation was possible for HMRC or the Tribunal because both the imposition and amount of the penalty was subscribed in the legislation.
- 10 23. She submitted that the fact that the appellant did not receive a large payment from head office until around the 22nd of the month was not a new or unexpected incident and provision should have been made to pay their PAYE on time.
24. She submitted that the appellant's accountant should have kept their clients up to date with any changes such as introduction of the new penalty regime.
- 15 25. She submitted that HMRC charged the penalties based upon the rules as legislated by parliament. The penalty was supposed to be a deterrent and not supposed to represent commercial restitution for the loss of the money. The penalties increased with the number of PAYE payments not paid on time. The higher the number of defaults, the higher the rate.
- 20 26. She submitted that HMRC were under a legal obligation to operate to impose penalties in all cases where the payments were regularly made late.
27. She submitted that the appellant had a record of late payment in the years prior to 2010/11.
28. She submitted that there had been sufficient information in the public domain to inform the appellant of the implications of the new penalty regime.
- 25 29. She submitted in conclusion that the appellant had a history of poor compliance and had admitted that the PAYE had been paid late. She therefore submitted that the Tribunal should dismiss the appeal in its entirety.

Findings

- 30 30. We found that the penalty was not disproportionate as it was imposed in accordance with the legislation which stipulated the amount and that it should increase progressively as the number of defaults increased.
- 35 31. The Tribunal found that the accounts manager Mr Newman had spoken to HMRC and should have warned the directors. Additionally the appellant's accountants should have warned the appellant about the potential penalty for the late payment of PAYE. However we were concerned that HMRC had noted that a message had been left on an answer phone when the appellant did not have one.

32. We did accept that the appellant had no option but to wait for money from their head office in Italy and so we found that penalty in respect of the first two months should be cancelled to allow for the fact the money had been late coming in from the headquarters in Italy.

5 **Decision**

33. The appeal is allowed in part. The penalty in respect of the months 2 and 3 is hereby cancelled. Thereafter Mr Newman the accounts manager or Mr Earle had spoken to HMRC and ought to have been aware of the penalty regime.

10 34. The appeal is dismissed in respect of all the other months of the year and the penalty in respect of those months is hereby confirmed.

15 35. 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