



TC02392

Appeal number: TC/2011/09984

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DRAIN AWAY (BOURNEMOUTH) LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE ADRIAN SHIPWRIGHT
CHARLES BAKER FCA**

**Sitting in public at Southampton Appeals Service, 83-85 London Road, Southampton
SO15 2SH on 12 July 2012**

**Having heard Debra Veneroso for the Appellant and Gill Carwardine for the
Respondents**

DECISION

- 10 1. The Tribunal decided that the Appeal should be dismissed as the Taxpayer had not shown that the defaults had not occurred nor any reasonable excuse within the statutory meaning.
2. This is an appeal by Drain Away (Bournemouth) Limited (“the Taxpayer”) against the imposition of a penalty under paragraph 6 Schedule 56 Finance Act 2009. The penalty relates to late payment of PAYE in 201/11 and was for £3,729.45 after revision following the *Agar* decision. It was originally for £4074.29.
- 15 3. The Notice of Penalty was dated 3 August 2011.
- 20 4. The payment position from the evidence before us was as follows.

	<i>Period Ended</i>	<i>Paid on time</i>	<i>Counts towards default?</i>	<i>Unpaid after six months?</i>	<i>Comment</i>
1	5 May, 2010	No	No	No	
2	5 June, 2010	No	Yes	No	
3	5 July, 2010	No	Yes	No	
4	5 August, 2010	No	Yes	No	
5	5 September, 2010	No	Yes	No	
6	5 October, 2010	No	Yes	No	
7	5 November, 2010	No	Yes	No	
8	5 December, 2010	No	Yes	No	
9	5 January, 2011	No	Yes	No	
10	5 February, 2011	No	Yes	No	
11	5 March, 2011	No	Yes	No	

5. This means there were 10 relevant defaults which under paragraph 6 (set out below) gives a 4% rate.
- 25 6. Paragraph 6 Schedule 56 FA 2009 provides:
“(1) P is liable to a penalty, in relation to each tax, of an amount determined by reference to—
- 30 (a) the number of defaults that P has made during the tax year (see sub-paragraphs (2) and (3)), and
(b) the amount of that tax comprised in the total of those defaults (see sub-paragraphs (4) to (7)).
- (2) For the purposes of this paragraph, P makes a default when P fails to make one of the following payments (or to pay an amount comprising two or more of those payments) in full
- 35 on or before the date on which it becomes due and payable—
(a) a payment under PAYE regulations;
(b) a payment of earnings-related contributions within the meaning of the Social Security (Contributions) Regulations 2001;
(c) a payment due under the Income Tax (Construction Industry Scheme) Regulations 2005;

(d) a repayment in respect of a student loan due under the Education (Student Loans) (Repayments) Regulations 2009 or the Education (Student Loans) (Repayments) Regulations (Northern Ireland) 2000 (S.R. 2000 No 121).

(3) But the first failure during a tax year to make one of those payments (or to pay an amount comprising two or more of those payments) does not count as a default for that tax year.

(4) If P makes 1, 2 or 3 defaults during the tax year, the amount of the penalty is 1% of the amount of the 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 the tax comprised in the total 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 the tax comprised in the total 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 the tax comprised in the total of those defaults.

(8) For the purposes of this paragraph—

(a) the amount of a tax comprised in a default is the amount of that tax comprised in the payment which P fails to make;

(b) a default counts for the purposes of sub-paragraphs (4) to (7) even if it is remedied before the end of the tax year.

(9) The Treasury may by order made by statutory instrument make such amendments to sub-paragraph (2) as they think fit in consequence of any amendment, revocation or re-enactment of the regulations mentioned in that sub-paragraph”.

7. In essence, the Taxpayer argued that there should be a lesser penalty. It was the level of penalty that the Taxpayer disagreed with.

8. The Taxpayer’s Grounds of Appeal as set out in the Notice of Appeal were as follows.

“Our appeal against this charge is always been based on the fact that at no time prior to receiving the letter dated 3 August where we made aware that we will be penalised in this way for late payment of PAYE.

This is borne out by the response to our appeal by HMRC – letter dated 31 October, 2011. They confirm conversations where we were told that “a penalty charging system was being brought into force in the near future” but when pressed for a day that this would happen, the person on the phone was unable to tell us. The penalty default letter dated 28 May, 2010, stated that “Penalties may be charged” and subsequent before warnings let us never at any stage made us aware that we would be penalised in the way for late payment.

The district letters we receive gave no indication for penalty system was in force, our conversations with both the HMRC Office and their staff during visits to our premises never resulted in us being made aware of a penalty system having been implemented stop

This is all borne out in the HMRC response to a second appeal.

Following our letter dated 3 August where we were made aware of the introduction of the penalty system, we have ensured that all subsequent payments had been made on time. If we have been aware of this before, we may have acted differently and losses incurred this charge.

If we intend to charge our customers interest and charges for late payment is has the stature requirement that we inform them of this. We feel HMRC have every opportunity to make us aware of that these charges will be applied and so to do so.

The response from HMRC dated 31 October states that we were made aware of “likely” penalties and for this reason they have not upheld our appeal. They do not state that we were made aware definitively at any time that we “would” incur penalties can therefore we consider these charges totally unjust”.

9. Essentially, HMRC argued that the payments were not made on time. The penalties therefore arose and were properly imposed. They had to stand in the absence of reasonable excuse. No reasonable excuse had been shown.

10. We find as set out above that the payments were not made on time.

5 11. HMRC make taxpayers aware of the penalty regime through the notes to their forms, their publications and their website. They do this as part of “Customer Service”. There is no statutory obligation to do so. The HMRC work log showed that warnings of penalties had been given. There was no evidence to contradict this. Accordingly, we accept that this was the position and so find.

10 12. The penalty thus stands unless the Taxpayer shows a reasonable excuse which existed throughout the relevant period.

15 13. Reasonable excuse is not defined in the legislation but is usually taken to mean something that is unexpected or unusual as either unforeseeable or beyond the person’s control which prevents compliance with the obligation.

20 14. As nothing suggesting a reasonable excuse within the statutory definition has been brought to our attention we find that the Taxpayer has not discharged the onus of showing that there was a reasonable excuse. We have carefully considered the Taxpayer’s Grounds of Appeal and what was said at the hearing in reaching this conclusion.

25 15. Whilst we are sympathetic to the Taxpayer's position the employees were paid and the amount of PAYE should have been withheld out of those payments. That money should have been used to pay the PAYE rather than used as working capital. The duty is on the Taxpayer to comply with his obligations under the Law.

16. Consequently, the appeal is dismissed.

30 17. 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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**ADRIAN SHIPWRIGHT
TRIBUNAL JUDGE**

RELEASE DATE: 24 October 2012

