



TC02396

Appeal number: TC/2012/06061

TYPE OF TAX – appeal against the penalty imposed for the late payment of PAYE- Schedule 56 Finance Act 2009—whether fact that appellant was given no specific warning was a reasonable excuse- no – whether lack of knowledge was a reasonable excuse – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ENDERSHAM LTD

Appellant

- and -

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

**TRIBUNAL: JUDGE SANDY RADFORD
JAMES MIDGLEY**

Sitting in public at Bedford Square, London on 6 September 2012

Mr P McNamara of Riordan O'Sullivan for the Appellant

Mrs G Orimoloye, Officer of HMRC, for the Respondents

DECISION

5 1. This is an appeal against the penalty of £7,445.31 imposed for the late payment of PAYE during 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 McNamara confirmed that the appellant is a family-owned business managed by Mrs and Mrs Godsave and their son. It is a cleaning contractor which has been trading for 37 years.

- 5 9. The appellant has some 200 employees and a £2.5 million turnover each year. The appellant has no full time accountant.

Appellant's submissions

10. Mr McNamara submitted that for 37 years the appellant had always paid their PAYE in full and thus had an impeccable compliance record.

- 10 11. He submitted that the payments were always only a few days late. This was often because generating and managing the business had to be put ahead of administrative duties of Mr Godsave the director who also had to get involved in the day to day operations, meeting customers, winning businesses, retaining existing businesses and agreeing prices.

- 15 12. He submitted that it was reasonable to expect that this non-accountant type family run business did not understand the severity of the legislation and the significance of being just a few days late.

13. He submitted that Mr Godsave posted a cheque each month for the PAYE and for four of the months in questions HMRC would have received the payment at the weekend.
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14. He submitted that HMRC had introduced "this new draconian regime" to the appellant only at the end of the financial year.

15. He submitted that it was HMRC's fault that the payments were made late because the new regime had not been publicised properly and previously the appellant had paid late without any penalty.
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16. He submitted that when HMRC introduced self-assessment in 1996/97 there was a big television and radio campaign and the penalty for late submission of the return was only £100.

17. He submitted that whilst the appellant had received a warning letter in May 2010 concerning the new penalty regime the letter had only said "you may be liable to a penalty". HMRC telephoned Mrs Godsave in November 2010 to remind her that the PAYE was late and although at the time a large penalty had already accrued to the appellant he submitted that the HMRC officer had made no mention of this but only asked for the payment.
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18. He submitted that no penalty demand had been made until October 2011 and this was unforgivable as HMRC had a duty of care to inform the appellant of the penalties which were accruing.
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19. He submitted that HMRC ought to have issued monthly warnings. The company had no cash flow problems and could quite easily have paid on time if they had known of the new penalty regime.

5 20. Finally he submitted that the implementation of the penalty regime was unfair and wrong because there should have been a transition period.

HMRC's submissions

21. Mrs Orimoloye submitted that the penalty notice could only be issued after the end of the tax year when the number of defaults which would indicate the penalty rate was known.

10 22. She submitted that the rate of penalty had been laid down by the legislation and there was no scope for change unless the appellant had a reasonable excuse for the late payment.

15 23. She submitted that in the previous year the appellant had regularly paid its PAYE late and it was unlikely that these late payments were consistently caused by postal delays.

24. Mrs Orimoloye submitted that HMRC had publicised the new late payment penalties for PAYE extensively before and after they came into effect. An employer pack featuring a CD-ROM was mailed to employers in February 2010, flyers mailed to contractors and fact sheets distributed at face-to-face events and published on the HMRC website. Late payment PAYE penalties had been featured in several issues of the Employer Bulletin, on the PAYE pages of the HMRC internet site and in published guidance and employer help books.

25 25. She submitted that whilst the penalty might seem harsh to the appellant it was set down by the legislation and HMRC had no scope to change it. Paragraph 11 of Schedule 56 dictated that if the tax payer was liable for a penalty then "HMRC must" impose it.

26. Finally she submitted that the appellant had no reasonable excuse for the late payment of the PAYE and nor were there any special circumstances.

Findings

30 27. The Tribunal found that the appellant had no reasonable excuse for the consistent late payment of the PAYE. We found that the appellant was in the habit of paying late as it had done so regularly in the previous year.

28. We found that the new penalty regime had been well-publicised by HMRC including the Employer Bulletins of September 2009, April 2010 and August 2010.

35 29. We found that effectively Mr McNamara 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.

30. In the case of *Agar Limited* [2011] UKFTT 773 (TC) which was a similar appeal against the penalty imposed for the late payment of PAYE the decision of the Tribunal was that the penalties were not “plainly unfair” within the meaning of the *Energys* decision and so were not disproportionate.

5 31. We found that the penalty was intended to be harsh and HMRC had no option but to impose the penalty as stipulated by paragraph 11 of Schedule 56.

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

Decision

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

10 34. 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
15 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision.

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**SANDY RADFORD
TRIBUNAL JUDGE**

RELEASE DATE: 29 November 2012

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