



TC02409

Appeal number: TC/2012/05103

Penalties for late payment of PAYE – whether reasonable excuse or other mitigating factors – no whether payment can be reallocated – no whether penalty proportionate – yes Appeal disallowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

CLARK WHITE PUBLICATIONS LTD

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE FIONAGH GREEN
MEMBER SONIA GABLE**

Sitting in public at 45 Bedford Square, London WC1 on 15 August 2012

Azadali Kanani for the Appellant

Justin Kruyer for the Respondents

© CROWN COPYRIGHT 2012

DECISION

Introduction

- 5 1. This is an appeal against a penalty for late payment of PAYE for the tax year 2010-2011.
2. Following the case of HMRC v Agar when the Tribunal ruled that the payment due in April 2011 should not be treated for the purposes of late payment penalties as a default during the tax year 2010-2011, the recalculated penalty charge at 5 April
10 2011 amounted to £3,346.14, being at the rate of 4% of the total amount of tax due in terms of the Finance Act 2009, Schedule 56, paragraph 6(7)

Facts

3. Mr Kanani gave evidence at the hearing. His evidence was not challenged by Mr Kruyer, appearing on behalf of HMRC. We find the material facts to be as follows.
- 15 4. Mr Kanani is the director of the Appellant company, Clark White Publications Limited, a publishing company with 9 employees which started having commercial and financial difficulties in 2006. In early 2007 administration was considered but due to cost-cutting exercises the company was able to continue, however, there were debts and communications with HMRC.
- 20 5. Late payment of PAYE was not disputed by Mr Kanani.
6. Evidence was submitted of the due date of payment for each tax month and the actual payment dates for the tax year 2010-2011 which showed a repeated pattern of late payments.
7. The due date for each payment was on the 19 day of each month as payment was
25 made by cheque using pay slips.
8. PAYE Late Penalty Payment Warning notice was issued by HMRC to the Appellant company on 28 May 2010 alerting Mr Kanani to the fact that payment in respect of Month 1 had been received late.
9. There were 10 defaults during the tax year that counted towards the penalty. The
30 total amount of these defaults was £83,653.58 which was not disputed by Mr Kanani. The default penalty is 4% of that amount.
10. The number of days late varied between 11 and 32 days late .
11. Mr Kanani informed HMRC that the company could not pay on time because of
35 cash-flow problems. The company was relying on business payments made to it in order to pay PAYE. The company had made payments to HMRC but not on time.
12. HMRC confirmed that when they calculated whether a payment was late or not they used a period of three days for a cheque to clear from the date of the bank lodged

payment. HMRC recommended that companies make PAYE payments electronically and the deadlines would then be the 22 of each month.

5 13. Mr Kanani had phoned the Business Support System for advice but no arrangement to pay was offered. Advice was given to make a payment. There was also a visit from a representative of HMRC in 2010.

14. HMRC issued a PAYE Late Penalty Payment Warning notice to Mr Kanani on 28 May 2010 alerting him to the fact that his payment in respect of Month 1 had been received late.

10 15. Mr Kanani asked HMRC to reduce the penalty and informed HMRC that he was contacting his member of parliament. Mr Kanani was concerned at the time taken by HMRC for review and the time to consider Mr Kanani's request made on 8 November 2011 for reallocation of the PAYE payments .

16. On 20 December 2012 HMRC requested sight of the P32s by 12 January 2012 but these were not provided.

15 17. HMRC requested further time for review on 13 December 2011 by telephone call with Mr Kanani and by letter on 16 January 2012.

20 18. HMRC's publications, including the Employer Bulletin issued in September 2009, gave advice on how to avoid penalties, stated clearly the dates by which payment should be made and also provided advice that if a business was unable to pay tax on time that they should tell HMRC as soon as possible.

25 19. Reference was also made to HMRC's publicity for the penalty regime by way of CD-ROM, their website, and 'Agent updates' all of which made reference to PAYE late payment penalties. The extract from HMRC's websites entitled 'How to Pay PAYE/Class 1 National Insurance Contributions' was submitted, as well as the HMRC Budget 2009.

Legislation

20. SCHEDULE 56 Finance Act 2009 provides:

1(1)A penalty is payable by a person ("P") where P fails to pay an amount of tax specified in column 3 of the Table below on or before the date specified in column 4.

30 Paragraphs 3 to 8 set out—

(a) the circumstances in which a penalty is payable, and

(b) subject to paragraph 9, the amount of the penalty.

(3) If P's failure falls within more than one provision of this Schedule, P is liable to a penalty under each of those provisions.

(4) In the following provisions of this Schedule, the “penalty date”, in relation to an amount of tax, means the date on which a penalty is first payable for failing to pay the amount (that is to say, the day after the date specified in or for the purposes of column 4 of the Table).

<i>Tax to which payment relates</i>	<i>Amount of tax payable</i>	<i>Date after which penalty is incurred</i>
---	----------------------------------	---

PRINCIPAL AMOUNTS

1	Income tax or capital gains tax	Amount payable under section 59B(3) or (4) of TMA 1970	The date falling 30 days after the date specified in section 59B(3) or (4) of TMA 1970 as the date by which the amount must be paid
2	Income tax	Amount payable under PAYE regulations	The date determined by or under PAYE regulations as the date by which the amount must be paid

Amount of penalty: PAYE

6 (1) P is liable to a penalty under this paragraph of an amount determined by reference to the number of defaults in relation to the same tax that P has made during the tax year.

(2) P makes a default in relation to a tax when P fails to pay an amount of that tax in full on or before the date on which it becomes due and payable.

(3) But the first failure during a tax year to pay an amount of tax does not count as a default in relation to that tax during that tax year.

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

(5) If P makes 4, 5 or 6 defaults during the tax year, P is liable to penalty of 2% of the total amount of those defaults.

(6) If P makes 7, 8 or 9 defaults during the tax year, P is liable to penalty of 3% of the total amount of those defaults.

(7) If P makes 10 or more defaults during the tax year, P is liable to penalty of 4% of the total amount of those defaults

Special reduction

9 (1) If HMRC think it right because of special circumstances, they may reduce a 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.

Reasonable excuse

16 (1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a payment if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.

(2) For the purposes of sub-paragraph (1)—

(a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control,

(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and

(c) 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 ceased.

Issue

21. Late payment was not in dispute and the only issues for the Tribunal was whether there should have been reallocation of payments of PAYE as requested by Mr Kanani, whether there was reasonable excuse for late payment, and whether there should be special reduction and whether the penalty was disproportionate.

Submissions

22. Mr Kanani accepted that the PAYE was due and that payments were late. Mr Kanani had told HMRC that payment could not be made on time because of cash flow problems and that there were exceptional circumstances because of the economic downturn and that he was trying to keep the company afloat. He had contacted the Business Support System and had been told to make a payment which he had done.

He had explained the difficulties to the representative of HMRC when visited in 2010. Mr Kanani considered the penalty targeted employers and that penalties imposed were subjective and arbitrary and that he had made every effort to pay and to reduce the penalty. The company was a small company. Mr Kanani had contacted his Member of Parliament, Mr Patel who had contacted HMRC and Mr Kanani thought that the penalty would be reduced as Mr Patel had been told that HMRC would sort it out. Mr Kanani had requested HMRC consider reallocation of PAYE payments and that with reallocation only three payments, Month 1, 6 and 10 would have been late. It was HMRC who had delayed their response. Mr Kanani asked for reallocation or special reduction and that there was reasonable excuse for late payment. Mr Kanani considered that the penalty was disproportionate.

23. Mr Kruyer submitted that the penalty is set by statute and is graduated on the basis of the number of late payments made. In those circumstances, the penalty cannot be deemed to be unfair. Furthermore, the way in which the legislation applies means that it is not possible to calculate the amount of a penalty until the end of the tax year. By paying late there was an unfair advantage over those who paid on time. Mr Kanani had not said that he was unaware of the penalty regime and that HMRC had publicised the system and issued bulletins and that information was readily available on HMRC's website and a CD rom was issued to all employers in February 2010. The penalty was proportionate and applied equally to all employers. There was nothing exceptional and lack of funds could not amount to special circumstances or reasonable excuse and that no particular reason had been given to have caused the financial difficulty apart from the economic downturn. PAYE payments made are accepted and allocated in good faith and cannot be reallocated to enable a re-calculation of the penalty.

Discussion

24. We considered Mr Kanani's written and oral submissions carefully. We were satisfied that HMRC had publicised the late payment penalties for PAYE extensively both prior to and after their implementation. The legislation does not require HMRC to issue warnings to individual employers, yet HMRC so did by issuing a letter to Mr Kanani on 28 May 2010 alerting Mr Kanani to the fact that payment in respect of Month 1 had been received late. No reasonable employer aware of his responsibilities to make payments of PAYE prior to the deadline could fail to have been aware of the information published by HMRC. In our view Mr Kanani knew that the payments were being paid late and he accepted this in his evidence and in his correspondence with HMRC. The reason for the late payment was because of his difficulties in managing his business cash flow and to stay within the lending limits set by his bank. Although Mr Kanani had contacted the Business Payment Support Service there was

no agreement for time to pay. The Employer Bulletin CD ROM clearly states that to avoid late payment penalties an employer must pay on time and in full.

25. The legislation on PAYE penalties is clear. The rate is set by the number of late payments in the tax year by the employer. There was no dispute that the PAYE payments were late and that the penalty had been correctly raised.. HMRC correctly charged the penalty at the set rate of 4%. The penalty can only be assessed once the total number of late payments for a particular tax year is known. We found as a fact that any failure by HMRC to issue regular warnings about accruing penalties could not amount to either a reasonable excuse or special circumstance. The payments were paid late the number of days late varying from 11 to 32. PAYE late payment penalties are intended to encourage more employers to pay by the due date.

26. The legislation specifically provides that special circumstances do not include the ability to pay.

27. There were no exceptional circumstances which could amount to a reasonable excuse for the late payments. A reasonable excuse is something exceptional that could not be predicted and which is outside of the employer's control. A lack of funds is not a reasonable excuse unless the shortage is due to unforeseeable events outside of the employer's control and there was no evidence of this. Mr Kanani had paid late because of cash flow difficulties and because of the economic downturn. Mr Kanani had not done all that he reasonably could to make sure that payments were made on time. There were no specific reasons put forward by Mr Kanani relating to each of the late payments, only the general reason of lack of funds.

28. As to the reallocation, we decided that the payments cannot be reallocated simply to enable a re-calculation of the penalty and that there was no evidence that at the time the payments were made they were intended to be allocated to the months stated in the reallocation request.

29. As to the issue of proportionality, the test is whether the scheme is not merely harsh but plainly unfair. We found as a fact that the imposition of the penalty in this case, whilst no doubt considered by Mr Kanani to be harsh, was not plainly unfair. The legislation seeks to provide an incentive to employers to adhere to their payment obligations and the imposition of penalties where they fail to comply with these requirements cannot in our view be described as lacking reasonable foundation.

35

Decision

30. For the reasons given above, our decision is that HMRC correctly applied Schedule 56 Finance Act 2009 and that the penalty for late payment of PAYE was correctly calculated and charged. The penalty of £3,346.14 was not disproportionate. There was no reasonable excuse for late payment. There was no special reduction

which applied. There was no evidence to justify the reallocation of the payments made. The appeal is dismissed and the penalty of £3,346.14 for the tax year 2010-2011 affirmed.

5 31. 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
10 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.

15

**FIONAGH GREEN
TRIBUNAL JUDGE**

RELEASE DATE: 8 December 2012

20