



TC02412

Appeal number: TC/2012/06126

TYPE OF TAX – appeal against the penalty imposed for the late payment of PAYE- Schedule 56 Finance Act 2009-appellant paying using wrong reference- concerned when informed by HMRC payments not received –held back payments- five different HMRC offices involved – appeal allowed for months 5, 6, and 7- dismissed for all other months

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

EUROBULK LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE SANDY RADFORD
JAMES MIDGLEY**

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

Ms S Beazer, financial manager of the Appellant, for the Appellant

Mrs G Orimoloye, Officer of HMRC, for the Respondents

DECISION

5 1. This is an appeal against the penalty of £2,530.40 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. Ms Beazer explained that the appellant changed payment methods to electronic from April 2010. They were talked through the process by HMRC and believed they were paying using the correct reference.

5 9. During the year the appellant was notified that payments were not being received. This resulted in payments being made late as the appellant was reluctant to keep sending payments that were not received or allocated to their account.

10. Until then according to Ms Beazer all the payments had been made on time with the exception of months 1 and 2.

10 11. Ms Beazer stated that when they were told that the payments had not been received it made perfect sense not to continue sending funds to the account as they had been constantly advised to be vigilant and wary of fraudulent transactions.

15 12. The appellant did not dispute that some of the payments were sent late but they were greatly concerned with the problems on their account and the continuing conflicting information received from various offices of HMRC.

13. The appellant stated that they had received letters from HMRC at Bradford, Chesterfield, Southend and London; and each time Ms Beazer telephoned she had spoken to a different person and been transferred from one department to another because no one person was able to deal with the complete problem.

20 14. The initial problem appeared to have been caused by the PAYE payments being allocated to the corporation tax account because the wrong reference was used.

15. Eventually all the payments were correctly allocated apart from £9,746.63 which had been posted to a corporation tax holding account and it too was correctly allocated eventually.

25 16. Ms Beazer gave evidence that HMRC had phoned her several times to say that they had not received any PAYE from the appellant that year which was when she realised that there was a problem.

30 17. The problem apparently arose because the appellant had used its reference number from the previous year but until this was discovered Ms Beazer was reluctant to make further PAYE payments. Ms Beazer said however that all that was missing from the payment reference was the last four digits such as 04/10.

Appellant's submissions

18. Ms Beazer submitted that the misallocation of the PAYE had resulted in an apparent overpayment of some £10,000 for the year 2009/10.

19. She submitted that she disagreed with the imposition of the penalty by HMRC because they had not dealt directly with the detailed responses to the appellant's letters.

5 20. She submitted that no-one had been able to tell them why they were not informed of an apparent overpayment from the year 2009/10. If this information had been brought to the appellant's attention, the subsequent misallocation would not have occurred.

10 21. She submitted that the appellant was constantly advised to be vigilant and wary of fraudulent transactions so it made perfect sense not to continue sending funds to an account, which funds, according to HMRC, had not been received.

22. She submitted that it was the appellant's conclusion that the penalty was unjust because the payments were sent late following conflicting and inconsistent advice from HMRC.

HMRC's submissions

15 23. Mrs Orimoloye submitted that the appellant had always paid late in the previous tax year and had thus established a pattern of non-compliance.

24. She submitted that HMRC had no record of a telephone call concerning the online banking.

20 25. She submitted that the appellant had not been right to have withheld payment bearing in mind that they had used the main payment reference from the previous tax year.

26. Mrs Orimoloye submitted that the appellant had been provided with ample information on the payment dates and electronic banking.

Findings

25 27. The Tribunal found Ms Beazer to be honest and sincere. We accepted that the appellant had received conflicting information and inconsistent advice from a number of HMRC offices. Additionally we found that not all the appellant's telephone calls were adequately dealt with and some of their letters were not adequately answered.

30 28. We found that it appeared that HMRC might not have explained to the appellant the reason why the month 6 payment had been allocated to the corporation tax account.

29. We accepted that as a result of being told by HMRC that they had not received the PAYE payments the appellant was concerned at the possibility of fraud as they were now paying electronically.

35 30. For these reasons we decided that the penalty in respect of three of the months should be cancelled.

31. We did find however that the appellant had consistently paid late in previous years and even when the payments had been correctly allocated; it appeared that they were still late although this may have been in part because of their concern about the apparent non receipt of the payments.

5 **Decision**

32. In recognition of the confusing information supplied to the appellant from a number HMRC offices and the appellant's concern that despite paying their PAYE correctly as they believed, they were told by HMRC that no payments had been received and consequently stopped paying, we have decided to cancel the penalty in respect of months 5, 6 and 7 and the appeal is allowed in respect of these months.

33. In respect of the other months the appeal is hereby dismissed and the penalty in respect of these months are hereby confirmed.

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 "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: 8 December 2012