



TC02413

Appeal number: TC/2011/09532

*PAYE – appeal against the penalty imposed for the late payment of PAYE-
Schedule 56 Finance Act 2009- appellant did not receive warning letter and
always posted the PAYE on or around the 19th of the month – appeal
allowed in respect of two months – dismissed in respect of all other months*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

BROOME PARK NURSING HOME

Appellant

- and -

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

**TRIBUNAL: JUDGE SANDY RADFORD
 MRS HELEN MYERSCOUGH ACA**

Sitting in public at Bedford Square, London on 12 October 2012

Mr J Pannett of Haines Watts, Gatwick for the Appellant

Ms K Weare, Officer of HMRC, for the Respondents

DECISION

1. This is an appeal against the penalty of £12,052.20 imposed for the late payment
5 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
10 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
15 the first default is ignored. The amount of the penalty varies as provided by sub-
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
20 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.

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:

30 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—

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-
 - (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-
 - (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:

- (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.
- (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 Choy, who gave evidence on behalf of the appellant, has run the Broome Park Nursing Home in partnership with his wife since 1993. Two of their daughters joined them recently. Mr Choy, his wife and one of his daughters are all nurses.

5 9. They have some 60 employees but only Mr Choy can do the payroll which he does three days before the month end. As a result of overtime and sickness he often has to rerun the payroll and only after the rerun can he obtain accurate figures.

10 10. He accepted that during some months he had posted the PAYE late. He always posted the cheque around the 19th of each month and some months he posted the cheque before the 19th.

11. Although he received some phone calls from HMRC the calls were just queries as to when the PAYE would be paid and no mention of penalties was ever made.

15 12. Mr Choy was extremely concerned that HMRC had noted that the appellant's cheque for month 3 had been dishonoured and brought his bank statement to show that this was completely wrong.

13. Mr Choy stated that he had not received a warning letter as claimed by HMRC and had no idea that a penalty was being incurred.

Appellant's submissions

20 14. Mr Pannett submitted that it was the absence of the warning letter which had caused the problem.

15. He submitted that HMRC had a duty of care to tell the taxpayer about the penalty being incurred but instead all the telephone calls involved were queries about when the PAYE would be received.

25 16. Mr Pannett submitted that the penalty was disproportionate to the lateness of the payments which were only ever a few days late.

17. In the appellant's appeal Mr Pannett submitted that the imposition of the penalty was unfair and an abuse of the system.

30 18. He submitted that HMRC was obliged to administer the penalty regime in a fair and equitable way and had not done so.

HMRC's submissions

19. Ms Weare submitted that the appellant had no reasonable excuse for the late payments.

20. She submitted that although there was no requirement in the legislation to inform the taxpayer of the penalty, on 28 May 2010 a warning letter which was not returned was sent to the appellant and therefore the assumption was that it had been received by the appellant.

5 21. She submitted that the new penalty regime had been well publicised and therefore the appellant should have been aware of it.

22. She submitted that the penalty levels were designed to be penal in nature and intended to encourage payment on time.

10 23. The application of the penalty was not discretionary as is shown by paragraph 11 of Schedule 56.

24. The penalty was fair and the rate increased with the number of defaults.

Findings

15 25. We found Mr Choy to be a sincere and honest man who ran an efficient nursing home which had won a best nursing home in Surrey award. We found that he genuinely believed that he was paying the PAYE on time.

26. We accepted that he had not received the warning letter and was not aware of the new regime.

20 27. We found that ignorance of the law is not a reasonable excuse and we found that the penalty was properly administered by HMRC exactly in accordance with the legislation.

28. However we recognised that HMRC had made several errors in claiming that a cheque had been dishonoured, that the partnership was a company as stated in the review from HMRC dated 3 November 2011 and the non receipt of the warning letter.

25 29. We found it likely that months 1 and 6 which were only two days late were posted before the 19th of the month and should have reached HMRC in time.

Decision

30 30. The penalty in respect of months 3, 4, 5, 7, 8, 9, 10 and 11 is hereby confirmed and the penalty in respect of month 2, which becomes the first default and not counted, and month 6 is hereby cancelled.

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 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