



TC02420

Appeal number: TC/2011/08431

*PAYE – appeal against the penalty imposed for the late payment of PAYE-
Schedule 56 Finance Act 2009- director’s mother who had been responsible
for the payment of the PAYE for the last eleven years was diagnosed with
cancer of the tongue but kept trying to keep up with her work – director
initially unaware that she was unable to do so – found- that this was a
reasonable excuse for months 8, 9, 10 and 11 – appeal allowed in part and
penalty in respect of months 8, 9, 10 and 11 cancelled*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MULLANY’S COACHES LTD

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE SANDY RADFORD
MR JULIAN STAFFORD**

Sitting in public at Bedford Square, London on 27 September 2012

Mr Crawford, previous director of the Appellant, for the Appellant

Mrs G Orimoloye, Officer of HMRC, for the Respondents

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DECISION

1. This is an appeal against the penalty of £10,739.18 imposed for the late payment of PAYE in every month of the tax year 2010/11.

5 **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 many taxes: paragraph 1(1) (which applies to all taxes) states that a penalty is payable
10 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 subparagraphs (4) to (7):

15 (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.

In this and other paragraphs of Schedule 56 “P” means a person liable to make payments.

25 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—

(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),

35 (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 Crawford stated that he had run the business for 20 years and always paid PAYE on time. He said that he had taken over the business when his father-in-law had died young.

5 9. He stated that his mother did the wages from her home and the depot was elsewhere.

10. Mr Crawford admitted that he had received calls from HMRC asking when the PAYE would be paid but because there was no mention of a penalty charge he assumed that it was a scare tactic.

10 11. Mr Crawford said that he worked 7 days a week with often a 24 hour day and he had no time to watch the staff.

12. Unfortunately in 2009 his mother was diagnosed with cancer of the tongue and Mr Crawford brought evidence of this to the Tribunal.

15 13. In the meantime his father had tried to help but was really not much good because his mother had been doing the payroll for 11 years and no-one else knew how to do it.

14. As she was anxious to help her son he was reluctant to replace her. At the same time he didn't want to push her to work. She wanted to assist and he could not drag her out of her seat.

20 15. Mr Crawford stated that in 2011 he had sold the business and was no longer a director.

Appellant's submissions

16. Mr Crawford submitted that the penalty was disproportionate.

25 17. He submitted that there was never any question of a shortage of funds because the appellant was in a very good financial state.

18. He submitted that he just found it difficult pushing his ill mother to do the necessary work.

HMRC's submissions

30 19. Mrs Orimoloye submitted that regular Employer Bulletins had been issued to the appellant and therefore it should have been well aware of the penalty regime.

20. She submitted that having heard that the appellant's mother was fully responsible for the payroll for the last 11 years she could not understand why she had been allowed to carry on after being diagnosed with cancer.

21. She submitted that alternative arrangements should have been made when Mrs Crawford was unable to come to work.

22. She noted that although wages had continued to be paid the PAYE was obviously not a priority.

5 23. She submitted therefore that the appellant had no reasonable excuse for the late payment of the PAYE.

Findings

24. The Tribunal found Mr Crawford to be honest, hard-working and sincere.

10 25. The Tribunal accepted that the coach business had become busier and busier and Mr Crawford was pleased to be able to rely on his mother to deal with the payroll.

26. The Tribunal found it quite believable that Mrs Crawford did not want to let her son down and he was therefore totally unaware that the PAYE was regularly being paid late.

15 27. The Tribunal found however that once Mr Crawford had spoken to HMRC on the telephone he ought to have checked with his mother as to the status of the PAYE payments.

28. The Tribunal found that the appellant had a reasonable excuse for the period of his mother's illness and so the penalty in respect of the defaults in months 8, 9, 10 and 11 is hereby cancelled.

Decision

29. The appeal is allowed in part in respect of months 8, 9, 10 and 11, and the penalty in respect of the other months is hereby confirmed.

30 30. 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