



TC02497

Appeal Number: TC/2012/01024

*INCOME TAX – PAYE - penalty for late payment – Schedule 56 FA 2009 -
proportionality of penalty - reasonable excuse - appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

CALBERTO LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: MR G. NOEL BARRETT LLB (Presiding Member)
MR LESLIE BROWN**

**Sitting in public at King’s Court Royal Quays Earl Grey Way North Shields
on 29th November 2012**

**Mr Norman Grievson Managing Director for the Appellant
Mrs Rosalin Oliver for HM Revenue and Customs, for the Respondents**

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DECISION

Introduction and the Law

1. This is an appeal against penalties for late payment of PAYE and National Insurance during tax year 2010-11. This was the first year of the operation of these new penalties.
2. The provisions of Schedule 56 Finance Act 2009 operate so as to impose a penalty at the end of the tax year by reference to the total number of defaults in the year.
3. Taking into account the decision in *Agar Limited v HMRC* [2011] TC 01625 no penalty can be levied in respect of any late payment of PAYE or National Insurance for tax month 12, as a default in tax month 12 represent the first default in the subsequent (2011-12) tax year. Although HMRC did originally levy a penalty for month 12, notice of the revised penalty, excluding month 12, was issued on 5th April 2012.
4. The due date for payments derives from Regulation 69(1)(b) Income Tax (PAYE) Regulations 2003. Non electronic payments must be made 'within 14 days after the end of the tax period'. The tax period ends on the 5th of each month. Therefore none electronic payments must be made by the 19th of each month. By Regulation 219 if payment is made by cheque and the cheque is met on first presentation then payment is treated as having been made on the date HMRC received the cheque.
5. HMRC allege that payments were late by a matter of 3 days for tax month 1, (However the first default in any tax year is disregarded altogether, paragraph 6(3) Schedule 56 Finance Act 2009) and for each of the tax months 3 to 11, ranging from 2 days late in month 3, to 8 days late in month 9.
6. This gives rise to 9 defaults for the purposes of the penalty regime in Schedule 56 Finance Act 2009 and to a penalty at the rate of 3%. The amount of the penalty is £6,667.72.
7. The amount of the penalty varies as provided by subparagraphs (4) to (7) Schedule 56 Finance Act 2009:
 - (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.
 - (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.

(P means a person liable to make payments)

8. Paragraph 9 (referred to in paragraph 15) Schedule 56 Finance Act 2009 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 –

5 (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-

10 (a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty.

9. Paragraph 16 Schedule 56 Finance Act 2009 provides that failure to make a payment will not give rise to a penalty if the tax payer satisfies the tribunal that there is a reasonable excuse for the failure. But an insufficiency of funds is not a reasonable excuse unless attributable to events outside the tax payers control. Nor is it such an excuse where the tax payer relies on another person to do anything unless the tax payer took reasonable care to avoid the failure; and where the tax payer had a reasonable excuse for the failure but the excuse has ceased, the tax payer is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse has ceased.

10. The Appellant appealed both on the grounds that the penalty imposed was disproportionate to its periods of default and on the grounds of reasonable excuse; that the Appellant Company had insufficient notice of the new penalty regime; that it had insufficient timely information and/or communication with HMRC as to its defaults as they occurred; and that it had posted its payment cheques to HMRC for each period prior to the due date, so that they might reasonably be expected to arrive on or before the due date.

The Evidence and our Findings of Fact

11. Mr Grievson submitted that the Appellant Company felt very strongly that the imposition of the penalties by HMRC was unfair because of the lack of information provided to it about the new penalty regime and because of the time it took HMRC to finally notify the Appellant of the actual amount of the penalty payable. The Penalty Notice being dated 12 August 2011, over four months after the end of the 2010-11 tax year. He also emphasised the lack of proportionality for a few days default. He underlined that there was no difference in the amount of the penalty for a few days default or for a default of up to 6 months.

12. Mrs Oliver produced documentary evidence to the tribunal of the publicity information HMRC had sent to all employers advising them of the new penalty regime for late payment. This included three or four separate Employer Bulletin Booklets dated September 2009, April 2010, August 2010 and February 2011 together with several HMRC Guidance Pamphlets.

13. Significantly Mr Grievson said that the Appellant was not aware of and/or had not received these bulletins and pamphlets.

14. Mr Grievson confirmed that the company had always historically paid before the due date. Specifically he confirmed that during the 2010-11 tax year at least eight of the payments had been made two or three days before the due date. His evidence was that cheques to HMRC were always posted first class, from a post box in Washington local to the Appellants business premises. He further confirmed that the cheques were always posted before the last collection of the day. He produced to the tribunal a table which he had compiled. We have copied below the fourth and fifth columns from Mr Grievson's table and have added a sixth column which shows the dates on which HMRC provided evidence that they actually received the Appellant's cheques.

Cheque Date	Cheque Cleared Date	Date HMRC Received Cheque
18.05.10 (Tues)	26.05.10 (Wed)	22.05.10 (Sat)
18.06.10 (Fri)	23.06.10 (Wed)	19.06.10 (Sat)
16.07.10 (Fri)	23.07.10 (Fri)	21.07.10 (Wed)
23.08.10 (Mon)	26.08.10 (Thurs)	24.08.10 (Tues)
15.09.10 (Wed)	28.09.10 (Tues)	24.09.10 (Fri)
18.10.10 (Mon)	27.10.12 (Wed)	23.10.10 (Sat)
18.11.10 (Thurs)	30.11.10 (Tues)	26.11.10 (Fri)
16.12.10 (Thurs)	30.12.10 (Thurs)	24.12.10 (Fri)
19.01.10 (Wed)	31.01.11 (Mon)	27.01.11 (Thurs)
18.02.11 (Fri)	28.02.11 (Mon)	24.02.11 (Thurs)
17.03.11 (Thurs)	25.03.11 (Fri)	23.03.11 (Wed)

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15. When comparing the cheque clearance dates with the dates of receipt of the cheques by HMRC, it can be seen through-out that cheques received on a working day were cleared within two or three working days including the day of receipt and that cheques received on a Saturday were cleared within three working days. This is even the case with the December 2010 cheque clearance.

16. The clearance times are consistent with the May 2010 payment which cheque was dated 18th June 2010 and which was paid on time, which was received by HMRC a day later on 19 June 2010 and which was presented for payment to the Appellant's bank within three working days, on 23rd June 2010. Further consistency is illustrated by the July 2010 payment which was by the Appellant's own admission as shown on the Appellant's table paid late. The cheque was dated 23rd August; it was received by HMRC the following day on 24th August and presented to the Appellant's bank on 26th August.

17. Although Mr Jim Jacobs (Company Secretary and General Manager for the Appellant), in his letter to HMRC dated 5th September 2011 said that he believed that delays were being caused by the time it takes to clear cheques, this is not supported by the cheque clearance times shown in the table above

18. Mrs Oliver produced HMRC computer generated records which showed that the Appellant had paid late during May 2009, December 2009 and February 2010.

19. Mrs Oliver confirmed that payments made by cheque to HMRC were processed on the day of receipt, stamped on the day of receipt and that that date was used as the payment date.

20. There are several conclusions which may be drawn from these somewhat contradictory facts; either that the postal service failed to deliver almost all of the cheques by the next working day or indeed within two or three days, (as mentioned by Mr Grievson), prior to the due date and in most months took three or four days to deliver the cheques, and in some months considerably longer than this; or that the cheques were delivered to HMRC on time, but for some reason were not processed by it for several working days; or that many of the cheques were not in fact posted by the Appellant until the day of, or a day or two after the due date for payment and after the cheques themselves were physically dated.

21. Mr Grievson did not produce any documentary evidence in the form of posting slips or receipts, a post book, or carbon or file copy letters to substantiate his evidence as to the dates of posting of the cheques, as opposed to the physical dates on the cheques themselves.

22. Mrs Oliver confirmed that the Appellant had been notified of its April 2010 default, by letter dated 28th May 2010 which was deliberately sent after month one, but before a month two default, so as to try to avoid a further default taking place. Mr Grievson said that the Appellant had not received the letter dated 28th May 2010 from HMRC warning of the April 2010 default.

23. Mrs Oliver produced evidence from HMRC's computerised records of a number of telephone conversations with Mr Jacobs, the Appellant's Company Secretary and General Manager. On the 24th August Mr Jacobs had informed HMRC that payment would be made late due to cash flow problems. He was reminded of his obligation to pay by the 19th of the month. The HMRC computer generated heading of the record somewhat mis-leadingly entitled that conversation as "refuses to pay". Mrs Oliver explained, when challenged by Mr Jacobs, that this was an unfortunate computer generated shorthand and that it did not mean that there had in fact been refusal to pay. We think that HMRC should consider revising this shorthand as it is clearly misleading to Appellants and could have misled the tribunal had it not been clarified.

24. On Monday 25th October 2010 HMRC left an answerphone message for the Appellant about late payments, although in fact the Appellants cheque was being processed that same day having been received by HMRC on Saturday 23rd October.

25. A further telephone conversation took place on 24th November 2010 this time between HMRC and Mr Grievson, when Mr Grievson said that payment for October 2010 had been made late on 23rd November 2010, due to cash flow difficulties. Mr Grievson's evidence provided to the tribunal by way of the table above was that the cheque for October 2010 was dated 18th November 2010, 5 days before the 23rd November, which was the date of posting he had mentioned to HMRC in his telephone conversation with them on 24th November 2010. The computer record again records "refused to pay" which Mrs Oliver again accepted was not the case.

26. The dates on the table for the receipt of the November cheque on 26th November 2010 and presentation to the Appellants bank on 30th November 2010 are in our view consistent with the cheque having being posted by the Appellant on the 23rd November and not some 5 days earlier, particularly in view of the Appellants confirmation that all cheques were sent by first class post.

27. On 24th December 2010 HMRC left a further answerphone message for the Appellant about late payments.

28. On 25th January 2011 HMRC again spoke with Mr Jacobs when he confirmed that the payment due that month would be late due to cash flow difficulties. HMRC say that he was "educated as to in year penalties". Mr Grievson's evidence in contrast by way of the table above, was that the cheque for December 2010 was dated 19th January 2010, 6 days before the telephone conversation between Mr Jacobs and HMRC took place on 25th January. It seems curious if the cheque was in fact sent by first class post on the 19th January, why it should take until 27th January some 8 days to reach HMRC? We are of the opinion that it is much more likely that the cheque having been dated 19th January was not then posted until much nearer to the date of receipt by HMRC, possibly not until after Mr Jacob's discussion with HMRC on 25th January. Again the cheque was presented to the Appellants bank on 31st January 2010, within three working days of receipt by HMRC.

29. Mr Grievson commented only briefly to the tribunal about the Appellant’s cash flow difficulties and as to how the Appellant had at times been on short time, but no more detailed evidence was provided to the tribunal as to the reasons behind any lack of funds nor as to whether any lack of funds was attributable to matters which were
5 beyond the Appellants control, or as a result of matters arising from a sudden or immediate shortage of funds.

Proportionality

30. Whilst we do have some sympathy with the Appellant’s arguments as to the lack of a timely reminder from HMRC as to the actual amount of the penalties being
10 incurred month by month, as opposed to the general reminders HMRC gave to the Appellant, that a penalty may be charged, we accept that HMRC did try to inform all employers about the new penalty regime and in this particular case HMRC, as we have already noted, contacted the Appellant on a number of occasions during the period of default informing the Appellant that penalties may be incurred.

15 31. In our view any ignorance of the law on the Appellant’s part as to the actual amount of the penalties likely to be imposed by HMRC cannot constitute a defence.

32. We also accept that the amount of the penalty imposed, particularly for paying just a few days late, may seem to the Appellant harsh. However we do not believe that the penalty is either “plainly unfair” in the terms of the earlier case of *Energys Holdings UK Limited v HMRC* [2010] UKFTT 20, nor in our opinion is the penalty
20 devoid of reasonable foundation. The new penalty regime has been imposed by HMRC strictly in accordance with the legislation as enacted by Parliament, and the penalty itself increases proportionally with the number of defaults. We are not satisfied therefore that the penalty imposed is in any way disproportionate. Nor do we
25 find that there has been any unfairness in the approach of HMRC, in the way it publicised the introduction of the penalty regime or in notifying the defaults, or the penalty to the Appellant.

33. Furthermore as recently decided by the Upper Tribunal in *Hok v HMRC* [2012 UKUT 363 (TCC)] at paragraph 41, this tribunal has in any event no judicial review
30 function, nor can this tribunal apply principles of natural common law justice in determining the penalty. As such this tribunal cannot therefore interfere with the penalties laid down by Parliament. The Upper Tribunal confirmed at paragraph 56 of their decision in *Hok* that;

35 “Once it is accepted, as for the reasons we have given it must be, that the First-tier Tribunal has only that jurisdiction which has been conferred on it by statute, and can go no further, it does not matter whether the Tribunal purports to exercise a judicial review function or instead claims to be applying common law principles; neither course is within its jurisdiction”

34. As such we are unable to accept the Appellants appeal either on the basis of lack of proportionality, or on the basis that because it was not informed in a timely way of
40 the actual amount of the penalties payable, that this somehow breached some common law principle of fairness.

Reasonable Excuse

35. The burden of establishing a reasonable excuse lies on the Appellant. Mr Grievson told the tribunal that there were at least 8 payments where the cheques were dated and posted by first class post two or three days before the due date.
- 5 Unfortunately, as we have already noted, his evidence was contradicted by the evidence of either his or Mr Jacobs earlier telephone discussions with HMRC. In which either Mr Grievson or Mr Jacobs confirmed that the payments made in August 2010, November 2010 and January 2011 would be paid late due to cash flow difficulties.
- 10 36. Furthermore as we have said we are greatly persuaded by the evidence as to the receipt of cheques as provided by HMRC, which receipts correlate with the subsequent cheque clearances- the dates of which were provided by the Appellant. We do not accept that HMRC delayed in processing the receipt of cheques nor that it for some reason delayed presentation of cheques.
- 15 37. We are of the opinion that whilst we accept that the Appellant's cheques were dated some days before the due dates, (apart from the cheque dated 23rd August 2010), that in view of the dates of receipt as recorded by HMRC that they could not have been posted as Mr Grievson said they were by first class post "two or three days before the due dates". Indeed in this respect Mr Grievson's own evidence is somewhat
- 20 contradictory as it is clear from the table that many of the cheques were dated considerably more than two or three days before the due dates, in the case of the July payment the cheque was dated 16th July, that for September was dated 15th September and that for December was dated 16th December. We are therefore of the opinion that the dates on the cheques as shown in the table have no bearing as to the dates on
- 25 which the Appellant actually posted the cheques to HMRC.
38. Furthermore, "working backwards" using the table, from the dates recorded by the Appellant for presentation of the cheques, to the dates recorded by HMRC for the receipt of those same cheques it seems to us highly probable that all of the cheques apart from that dated 18th June were posted on or after the 19th day of the relevant
- 30 month.
39. Helping us reach this conclusion have been the Appellants several references to its experiencing cash flow shortages or difficulties throughout the period in question linked to HMRC's records of the telephone conversations which took place during August and November 2010 and January 2011 during which the Appellant admitted
- 35 making late payments.
40. Because we believe that the cheques were posted on or after the 19th day of the relevant month we do not find it necessary to examine in any greater detail issues relating to the efficiency of the postal service or as to the likelihood or not of next day delivery occurring with first class post, or the reasonableness or otherwise of the
- 40 Appellant's belief that cheques sent by first class post two or three days before the due date would arrive with HMRC in time.

41. We do not therefore believe that the Appellant has a reasonable excuse as to its cheques being received by HMRC after the due date for payment. We have concluded having considered all of the evidence that the most likely explanation for the late delivery of the payment cheques is that many of the cheques were not in fact posted by the Appellant until the day of, or a day or two after the due date for payment this being sometime after the cheques themselves were physically dated.

42. Unfortunately Mr Grievson provided no evidence as to the factors behind the Appellants cash flow difficulties, nor as to whether any lack of funds was attributable to matters which were beyond the Appellants control. Consequently we are unable to find that the Appellant has a reasonable excuse for making payment after the due date, attributable to matters beyond its control or as a result of matters arising from a sudden or immediate shortage of funds.

Decision

43. In the circumstances we dismiss the appeal.

44. 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.

**G. NOEL BARRETT LLB
TRIBUNAL PRESIDING MEMBER**

RELEASE DATE: 22 January 2013