



**TC02568**

**Appeal number: TC/2012/06807**

*PAYE - appeal against the penalty imposed for the late payment of PAYE-  
Schedule 56 Finance Act 2009- insufficiency of funds – illness of  
administrator- appeal allowed in part- appellant had acted as a careful and  
competent businessman in the face of severe and unexpected financial  
difficulties and HMRC officer who visited monthly to collect PAYE failed to  
mention accruing penalty*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**BALE GROUP LIMITED**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE SANDY RADFORD  
RICHARD CORKE**

**Sitting in public at Exeter on 1 November 2012**

**Mr R Clutterbuck of Francis Clark LLP accountants for the Appellant**

**Mr D Bradley, officer of HM Revenue and Customs, for the Respondents**

## DECISION

1. This is an appeal against the penalty of £6,756 imposed for 6 late payments of PAYE during tax year 2010/11.

### Background and facts

2. The appellant employs over one hundred people in its waste solutions business.

3. On 19 October 2011 HMRC issued penalty determinations against the appellant in amount of £26,265.94 as a result of the appellant making late payments of its PAYE for each month of the tax year 2010/11.

4. The appellant appealed against the penalties on 2 November 2011. HMRC replied on 9 November 2011 stating that it was unable to accept the grounds for appeal as a reasonable excuse and offering a review of the case.

5. As a result of the decision in the *Agar* case HMRC issued a revised penalty notice reducing the penalty to £22,717.68.

6. On 29 May 2012 the appellant requested a statutory review of the decision and prior to the review taking place submitted additional information.

7. The conclusion of the review was that a reasonable excuse existed for months 1, 2 and 3 and the penalty was reduced to £11,928.26.

8. The appellant appealed to the Tribunal on 2 July 2012 and a further review of the case found that the appellant had reached agreement with HMRC to pay month 10 late. As a result the penalty was reduced to £6,756.

9. Mr Clutterbuck explained that in May 2010 he had been asked by the bank to step in and help the appellant which was in a mess. Mrs Bale who was responsible for much of the administration had had a period of illness and the appellant's invoice factoring had been significantly reduced.

10. In March 2010 the Royal Bank of Scotland, in restricting the invoice discounting facility which the appellant used, took away some £85,000 from its credit facility. Prior to this NatWest Bank had reduced the appellant's overdraft facility by £100,000.

11. These actions were taken by the banks as a result of the appellant's loss of significant business accounts. The loss of the turnover from these accounts resulted in further erosion from the appellant's invoice discounting facility.

12. Mr Morgan, who was just appointed a director of the appellant in May 2010, gave evidence that previous to October 2011 the appellant had experienced two terrible years. It lost one-third of its business and sustained significant losses.

13. The directors remortgaged their homes and took only a minimal salary and in all lent the appellant some £500,000 to keep it going.

14. Mr Morgan explained that during the 2010/2011 tax year the appellant had received regular visits from an officer of HMRC whose sole task was to collect the PAYE payments due. The officer always asked how much would be due the following month and when payment was likely to be ready. The appellant and the officer would agree a date for payment of the next instalment and this arrangement was always met by the appellant. This was accepted by the officer who at no time made any comment about the impact of this arrangement or the possibility of penalties.

15. In giving evidence Mr Morgan emphasised that the officer had made it quite clear by both his actions and his words when he called that provided that the appellant paid the PAYE when he called the next time everything would be fine.

16. Mr Morgan denied that he had ever been warned by HMRC of any potential penalty.

### 15 **The legislation**

17. 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 where the taxpayer fails to pay the tax due on or before the due date.

18. 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):

(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.

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

19. 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 –

- (a) assess the penalty,
- (b) notify P, and
- 5 (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),
  - (b) may be enforced as if it were an assessment to tax, and
  - 10 (c) may be combined with an assessment to tax.

20. 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:

- 15 (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
  - 20 (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
  - 25 (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.

21. 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.
- 30 (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-  
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- (a) staying a penalty, and
- (b) agreeing a compromise in relation to proceedings for a penalty.

22. 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.

10 **Appellant's submissions**

23. Mr Clutterbuck submitted that there were three reasons for the late payments. Firstly that the financial position of the appellant had been misunderstood and the case of *Customs and Excise Commissioners v Steptoe* [1992] BVC 142 was quite relevant.

15 24. Mr Clutterbuck referred to the case of *Keith Joseph-Lester v HMRC* [2011] UKFTT 114 (TC) in which Mr Lester won his appeal against HMRC as a result of being able to show that at all times he had acted as a responsible business man in trying to meet his liabilities to HMRC.

20 25. He submitted that the appellant had done everything it possibly could to save itself from liquidation and had managed to meet all of its direct and indirect tax liabilities through additional borrowings and prudent management.

25 26. He submitted that in the case of *Steptoe* the Court of Appeal had accepted that although an insufficiency of funds can never of itself constitute a reasonable excuse, the cause of that insufficiency being the underlying reason for the taxpayer's default might amount to a reasonable excuse. He submitted that the underlying reason for the appellant's default was the unexpected loss of one-third of its business and the unexpected actions of its banks in reducing the appellant's overdraft and credit facility.

30 27. Secondly he submitted that the HMRC officer who visited the appellant to collect the PAYE had a duty of care to inform the appellant of the potential penalty position. Mr Clutterbuck produced a copy of the Taxpayers Charter which promised to provide the taxpayer with relevant information and stated "We want to give you a service that is even-handed, accurate and based on mutual trust and respect. We want to make it easy for you to get things right."

35 28. He submitted that in this matter HMRC had fallen far short of their duty of care.

29. Thirdly he pointed out that the penalty warning letter had been sent to the wrong address.

## HMRC's submissions

30. Mr Bradley submitted that HMRC had accepted that the loss of business specifically affected the months 1, 2 and 3 and similarly other specific events such as the banks restricting the invoice discounting facility and reducing the overdraft. As a result HMRC had accepted that the appellant had a reasonable excuse for months 1, 2 and 3. However after these months he submitted that HMRC would have expected the appellant to contact HMRC before the due date to request time to pay.

31. He submitted that whilst HMRC accepted that the appellant had suffered considerable financial difficulties, these difficulties had existed for some time. Referring to the case of *Joseph-Lester* he submitted that a competent reasonable businessman would have taken appropriate steps to comply with the PAYE deadlines.

32. He submitted that in order for insufficiency of funds to qualify as a reasonable excuse there must be a specific event beyond the appellant's control. He submitted that the downturn in the economy had affected virtually all businesses to varying extents and did not therefore constitute a reasonable excuse.

33. As to the HMRC visiting the appellant and failing to warn it of potential penalties, Mr Bradley submitted that HMRC was under no obligation to warn of penalties.

34. He submitted that in addition to the visits by the HMRC officer HMRC had tried to contact the appellant by telephone each month.

35. He submitted that the new penalty regime had been well publicised by way of and extensive marketing campaign.

36. He submitted that in the case of *Dina Foods Limited v HMRC* [2011] UKFTT 709 (TC) Judge Berner stated:

“We do not consider that the lack of awareness of Dina Foods Limited of the penalty regime is capable of constituting a special circumstance. In any event, having considered the evidence of the information provided by HMRC concerning the introduction of PAYE and NIC penalties, we are of the view that no reasonable employer, aware generally of its responsibilities to make timely payments of PAYE and NIC amounts due, could fail to have seen and taken note of at least some of the information published and provided by HMRC.”

## Findings

37. We accepted that the HMRC officer who visited the appellant lulled the appellant into a false sense of security by accepting the dates the appellant agreed to pay the PAYE without mentioning that those late dates would give rise to a penalty.

38. We found that the appellant had acted carefully and competently as a reasonable businessman and had tried to pay all its bills and keep its business going.

39. We found Mr Morgan and Mr Clutterbuck's evidence straightforward and honest.

40. We found that the appellant had suffered severe financial difficulties. Mr Bradley made us aware of the fact that the appellant had contacted the HMRC business support team in the past and so should have done so again.

5 41. However we found that the appellant had quite genuinely been unaware of the new penalty regime.

42. However this lack of knowledge cannot be totally accepted as a reasonable excuse for the lateness of the payments.

10 43. As a result of our finding that the appellant had acted as a reasonable competent businessman in the circumstances and in recognition of the failure of the HMRC officer to alert the appellant to the fact that it was running up penalties and its severe financial difficulties largely outside its control which continued until October 2011, in particular the reduction in its overdraft and its credit facility, we have decided that the penalty in respect of months 4, 5 and 6 should also be cancelled.

### **Decision**

15 44. The appeal is allowed in part. The penalty in respect of the late payment of PAYE in months 4, 5 and 6 is hereby cancelled. The penalty in respect of the remaining three late payments is hereby confirmed.

20 45. 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: 22 February 2013**