



TC02607

Appeal number: TC/2012/06857

*PAYE – appeal against the penalty imposed for the late payment of PAYE-
Schedule 56 Finance Act 2009- HMRC publicity regarding new regime and
penalty warning letter sent to wrong address – appeal allowed in part*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

HEIRTRACE LIMITED

Appellant

- and -

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

**TRIBUNAL: JUDGE SANDY RADFORD
 HELEN MYERSCOUGH**

Sitting in public at Norwich on 27 November 2012

Mrs Higgins, Managing Director of the Appellant, for the Appellant

Mr Foster, officer of HMRC, for the Respondents

DECISION

5 1. This is an appeal against the penalty of £2,276.76 imposed for the late payment of PAYE for every month of the tax year 2010/11.

2. The penalty was originally £2,514.91 but was recalculated due to the decision in the *Agar* case.

Legislation

10 3. 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.

15 4. 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.

20 (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.

25 (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.

5. 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.

35 (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
- (c) may be combined with an assessment to tax.

5 6. 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:

10 (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.

15 (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.

20 7. 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.

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.

30 8. 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

5 9. Mrs Higgins confirmed that the appellant had made its PAYE payments late each month. This was largely as a result of the appellant's cash flow problems but Mrs Higgins stated that if she had been aware of the penalty regime she could have made alternative arrangements with the appellant's bank to provide overdrafts to cover the cash flow.

10 10. The appellant's cash flow problems were caused by its biggest client, which provided some 70% to 80% of the appellant's business, starting to pay late.

15 11. Mrs Higgins stated that the appellant had not received the Employer bulletins and CD Roms detailing the new regime because they had been sent to the appellant's agent, Mr Adams, who only attended the appellant for a few hours once a month to deal with the management accounts and who in any event denied receiving the material.

12. The previous owner of the business had set up the account with HMRC and must have asked for any HMRC information to be sent to Mr Adams.

20 13. Mrs Higgins produced a copy of the letter dated 1 December 2008 which was sent to HMRC informing HMRC of the appellant's new contact details. However despite this letter HMRC continued to send information to Mr Adams.

25 14. Mrs Higgins disputed HMRC's contention that it was unable to contact the appellant by telephone on six different occasions as the appellant has eight telephone lines all coming into the same number and has never in the past had any experience of someone not being able to get through on so many occasions. In fact a key aspect of the business was to be contactable if anyone should call.

15. The appellant had also not received the penalty warning letter dated 28 May 2010 which was also sent to Mr Adams at The Cottage, Garlic Street.

16. P101 warning letters were issued to the appellant except for months 1, 3, 4 and 5.

30 17. In August 2011 the appellant had a specific visit by an HMRC inspector to ask why the PAYE was late. The inspector explained when the PAYE was due but did not discuss the penalty regime. The HMRC officer contended that the PAYE had not been paid for two months but in fact it was discovered that two months before the appellant had started paying the PAYE by BACS and had not put the correct reference number
35 so the wrong account had been credited.

18. On 29 November 2011 the appellant was issued a penalty notice by HMRC in amount of £2,514.91 and on 12 December 2011 the appellant appealed to HMRC against the penalty.

19. On 4 April 2012 HMRC replied refusing the appellant's appeal on the basis that the appellant had no reasonable excuse for the late payment of the PAYE.

20. The appellant sought an internal review the conclusion of which was that the penalty should be upheld. However the review did not acknowledge that both the
5 Employers Bulletin and the penalty warning letter had been sent to the wrong address, noting only that as these were not returned undelivered the appellant must have received them.

Appellant's submissions

21. Mrs Higgins submitted that the appellant had not been informed of the new
10 regime as despite her informing HMRC of the new contact details, the information together with the penalty warning notice dated 28 May 2010 had been sent to Mr Adams.

22. She submitted that the penalty was disproportionate and any reference by
15 HMRC to the case of *Rodney Warren & Co* was not relevant as in that case the appellant was aware of the new regime.

23. She submitted that if the appellant had been informed of the penalties earlier it would have made arrangements with its bank for an overdraft.

HMRC's submissions

24. Mr Foster submitted that the penalty was not disproportionate. He submitted
20 that the legislation is clear. If a PAYE payment is made late even by one day then in accordance with paragraph 11 of the Schedule HMRC must impose a penalty the rate of which is dictated by the number of late PAYE payments.

25. He submitted that P101 warning letters had been issued to the correct address and so the appellant should have been aware that it was paying late.

25 26. He submitted that as to the appellant's submission that the penalty was disproportionate, in the case of *Dina Foods Ltd Foods* [2011] UKFTT 709 (TC) Judge Berner stated at paragraphs 41 and 42:

30 "41. The issue of proportionality in this context is one of human rights, and whether, in accordance with the European Convention on Human Rights, Dina Foods Ltd could demonstrate that the imposition of the penalty is an unjustified interference with a possession. According to the settled law, in matters of taxation the State enjoys a wide margin of appreciation and the European Court of Human Rights will respect the legislature's assessment in such matters unless it is devoid of reasonable foundation. Nevertheless, it has been recognised that not merely must the impairment of the
35 individual's rights be no more than is necessary for the attainment of the public policy objective sought, but it must also not impose an excessive burden on the individual concerned. The test is whether the scheme is not merely harsh but plainly unfair so that, however effectively that unfairness may assist in achieving the social objective, it simply cannot be permitted.

5 42. Applying this test, whilst any penalty may be perceived as harsh, we do not
consider that the levying of the penalty in this case was plainly unfair. It is in our view
clear that the scheme of the legislation as a whole, which seeks to provide both an
incentive for taxpayers to comply with their payment obligations, and the consequence
of penalties should they fail to do so, cannot be described as wholly devoid of
reasonable foundation. We have described earlier the graduated level of penalties
depending on the number of defaults in a tax year, the fact that the first late payment is
not counted as a default, the availability of a reasonable excuse defence and the ability
to reduce a penalty in special circumstances. The taxpayer also has the right of an
10 appeal to the Tribunal. Although the size of penalty that has rapidly accrued in the
current case may seem harsh, the scheme of the legislation is in our view within the
margin of appreciation afforded to the State in this respect. Accordingly we find that
no Convention right has been infringed and the appeal cannot succeed on that basis.”

15 27. Mr Foster submitted that as enunciated in the case of *Dina Foods* the PAYE
legislation did not require HMRC to issue warnings to individual employers.

28. He submitted that the Upper Tribunal had recently found for HMRC in the case
of *Hok*. In making their decision the Upper Tribunal found that the First-tier
Tribunal’s finding, that HMRC’s failure to send a prompt warning was unfair, was
unsustainable.

20 **Findings**

29. Mrs Higgins appeared to us to be an efficient and competent businesswoman.
We accepted her statement concerning the lack of phone calls from HMRC and we
found her evidence to be truthful.

25 30. We found that despite the publicity surrounding the new penalty regime she had
not received the material which together with the penalty warning notice, despite her
provision of the appellant’s new details to HMRC, had been sent to the agent who
only attended the appellant for a few hours each month.

30 31. We accepted that she had no knowledge of the new regime and that if she had
known she could have made arrangements with her bank to pay the PAYE by the due
date.

32. However we found that ignorance of the law is not a reasonable excuse and as a
competent business woman, by the time of HMRC’s visit in August 2010, she ought
to have made further enquiries as to why it was so important to pay the PAYE on
time.

35 33. We found therefore that the appellant had a reasonable excuse for the late
payment by reason of the lack of phone calls from HMRC and the publicity material
and warning letter being misdirected up to and including the payment due for month
4.

40 34. We found that the penalty was not disproportionate as it had been imposed in
strict accordance with the Schedule.

Decision

35. The appeal is allowed in part and the penalty imposed in respect of the first four months is hereby cancelled. The payment due on 19 September 2010 for month 5 will therefore become the first default and not count towards the penalty. The penalty in respect of months 6 to 11 is hereby confirmed.

36. 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: 20 March 2013