



**TC02633**

**Appeal number: TC/2012/00982**

*PAYE – Late payment penalty – Whether payments made by due dates – HMRC failed to produce evidence of dates of receipt of monthly payments – Appeal allowed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**CED LIMITED**

**Appellant**

**- and -**

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

**TRIBUNAL:    SIR STEPHEN OLIVER QC  
                  JANET WILKINS**

**Sitting in public in London on 4 March 2013**

**M Kinder, Accountant, for the Appellant**

**Karen Weare of HMRC for the Respondents**

## DECISION

1. CED Limited, the Appellant, appeals against penalties charged under Schedule 56  
5 Finance Act 2009 on the grounds that it failed to pay monthly PAYE on time.

2. The penalty, imposed at the 3% rate, is £22,735. It relates to months 1-9 and 11 of  
2010/2011.

3. HMRC contend that the ten monthly payments to which the penalty relates were  
between two and five days late. Their evidence is based on internal records showing  
10 the “processing dates” of the payment cheques. These are said to demonstrate the late  
dates of the payments by CED. CED says that it always posted the monthly payments  
in time for them to reach HMRC by the due dates. Our conclusion is that the balance  
of evidence tends to support CED’s case. In particular, the evidence adduced by  
HMRC does not displace the case advanced by CED.

### 15 *HMRC’s Evidence for Imposing the Penalty*

4. HMRC’s evidence consisted of 11 photocopied pages. At the top of each page is  
an “ARP Serial Number” followed by the words “Processing Date”. The Processing  
Date is a date which, in 10 out of the 11 cases, falls between 2 and 5 days of the due  
date (the 19<sup>th</sup> of the month) for the relevant period. On each page is a photocopy of  
20 the cheque for the PAYE tax for the period. Most of the cheques were signed by Mr  
Richard Davies, the financial director and company secretary of CED.

5. Also in evidence was HMRC’s internal record of computer generated letters. This  
recorded that CED had been issued with a warning letter of 28 May 2010. The letter  
stated that the company had paid late once and if it continued to do so it “*may incur a*  
25 *penalty*”.

### *The Evidence for CED*

6. Mr Richard Davies (referred to above) attended the Hearing and gave evidence.  
He had been responsible for making tax payments for the last 20 years. CED had  
always made its PAYE payments by post. The GPO made a daily collection from  
30 CED’s premises. He was aware of the payment deadline for employers paying by  
post; this was the 19<sup>th</sup> of the month but, if the 19<sup>th</sup> fell on a weekend or a bank  
holiday, the payment had to reach HMRC on the last bank working day before the  
19<sup>th</sup>.

7. Mr Davies said that the letter containing the cheque was habitually sent, first  
35 class, a day before the 19<sup>th</sup> of the month in question or, where that was a weekend or  
bank holiday, two to three days before the 19<sup>th</sup>. Early in each month, he received a  
note of the PAYE for which the company had become accountable. A week or so  
before the due date he drew a cheque for the required amount and dated it the 18<sup>th</sup> or  
40 the 19<sup>th</sup>. (An exception to that routine occurred when CED had cash flow problems,  
usually in December/January: in that case a different arrangement would be made.)  
Once drawn, the cheque remained on his desk until the date for posting, i.e. the 18<sup>th</sup> or

two/three days earlier. The dates, he said, were “engraved on my mind”. When the posting date arrived, he released the cheque in its envelope for collection by the GPO.

8. Mr Davies claimed that he had not experienced anything that caused him to doubt that the letter would be delivered to the Tax Office the next day. He said of the  
5 quarterly VAT payments that they had always been posted the day before the due date and had always reached Southend-on-Sea on time. He was not aware of having seen the warning letter said to have been sent to CED on 29 May 2010.

### ***Conclusion***

9. The critical question is whether the letters containing the PAYE cheques were  
10 posted on time. A person can, we think, reasonably expect that a letter posted first class on Day 1 will reach its destination on Day 2. The GPO’s published aim is to deliver 93% of first class mail on the following day. Thus, CED would, unless something exceptional had occurred, have a reasonable excuse for late payment were the letter to be delivered later. That, however, is not the point here. Here HMRC say  
15 that their records demonstrate that Mr Davies was mistaken. The letters containing the cheques must have been posted late, otherwise they would not have been recorded as having “Processing Dates” falling between two and five days after the due date.

10. We were invited by HMRC’s representative to read the expression “Processing  
Date” as if it had said “Date of Receipt” because HMRC’s normal procedure is to  
20 present cheques on the date of receipt. We cannot accept that. There is no evidence to support it. Different tax offices may have different practices.

11. That leaves us with the evidence of Mr Davies. We do not consider that he was  
mistaken about posting dates. He had a system. The record for VAT compliance on  
CED’s part appears to have been beyond reproach. There was no suggestion that  
25 CED’s cash flow position was consistently such that it had to defer making the PAYE payments a day or two late. Carelessness did not appear to us to be Mr Davies’s style. Moreover, CED’s case that it paid on time has been their case since the very start of correspondence about the penalty. We accept his evidence and, in doing so. We  
30 acknowledge that the warning letter of 29 May 2010, if received by CED, had not been passed to him for action.

12. HMRC rightly accept that the burden of proof rests with it to satisfy the Tribunal that the person sought to be penalised has failed to pay its tax on time. The evidence HMRC has produced does not displace Mr Davies’s evidence. To the extent that CED has to rely on the “reasonable excuse”, we are satisfied that it has one.

35 13. For the reasons given above we allow the appeal.

14. 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  
40 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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**SIR STEPHEN OLIVER QC  
TRIBUNAL JUDGE**

**RELEASE DATE: 5 April 2013**

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