



TC02660

Appeal number: TC/2012/05739

PAYE penalties – notification by HMRC – jurisdiction of Tribunal – Hok applied.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

KUDOS SOFTWARE LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE RACHEL SHORT
WILLIAM HAARER**

**Sitting in public at St Catherine's House, 5 Notte Street Plymouth on 31 October
2012**

Mr Barrett for the Appellant

Mr Bates, Higher Officer of HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal concerning penalties for 7 late payments of PAYE for the periods June 2010 – March 2011 amounting to £1,439.48 in accordance with s 107 Finance Act 2009 and Schedule 56.

The Facts

2. Mr Barrett, a director of Kudos Software Limited, explained that the taxpayer company, Kudos Software Limited (“Kudos”) provided computer systems for retail businesses and employed between 10 and 14 people. During the relevant period the business was experiencing cash flow problems and so made a decision to pay their employees but delay PAYE payments to HMRC.

3. Mr Barrett confirmed that the PAYE payments for the periods in question had been made late and that he was not disputing the amount of the penalties. He also confirmed that he had entered into a “time to pay” arrangement with HMRC for previous tax periods. This covered the 2009 – 2010 tax year, when Mr Barrett said his cash flow problems were more acute than in 2010 – 2011. It was not suggested that this agreement covered the June 2010 – March 2011 periods.

4. Kudos had been notified by HMRC on 21 September 2011 that penalties of £1,439.49 were due; some 17 months after the penalties had in fact arisen.

The Taxpayer’s Arguments

5. Kudos’ appeal related to the manner in which they had been notified by HMRC of the fact that penalties were chargeable. Mr Barrett contended that he had not had reasonable notice that penalties would be charged under the new regime; the only correspondence which he had had from HMRC had merely stated that penalties “may” be charged, (HMRC’s letter of 28 May 2010). He claimed that there was nothing in the correspondence which he had received from HMRC which made it clear that penalties would be charged retrospectively. Kudos was not aware that penalty charges were being incurred for these periods.

6. HMRC should have informed Kudos that the penalties would arise in a timely way, and not retrospectively. Mr Barrett referred in this respect to the guidance and regulations which apply to UK banks when they charge interest, namely that customers had to be informed before interest could be charged. In his view, HMRC should be subject to the same rules and should be clearly communicating their intention to charge penalties. HMRC should also be notifying taxpayers within the taxpayers’ cycle of payments, not many months later as occurred here.

7. Mr Barrett’s business had always suffered from cash flow issues around month end and they had often paid their PAYE late as a result. In the past when Kudos had paid PAYE late they had not been charged interest. Mr Barrett stated that had he realised that for these periods Kudos would be charged penalties as a result of late payment, he would have changed his processes and ensured that payments were made on time. HMRC’s procedures for notification had been unfair and misleading. He

would have considered entering into a time to pay arrangement on behalf of Kudos if he had realised that the penalties were being charged. On this basis HMRC should only reasonably charge penalties for one month, not seven months.

8. Mr Barrett did not argue that there was any “reasonable excuse” for late payment.

HMRC’s arguments

9. HMRC responded that Mr Barrett had been supplied with their standard “Employer’s Pack” giving information about the new penalty regime and that he should have been aware that penalties would be levied for late payment. There was also information available about the new penalty regime on HMRC’s website, fact sheets and employers’ bulletins had also explained the changes.

10. HMRC also referred to a telephone conversation with Mr Barrett on 20 May in respect of tax payments due for May 2010 when a time to pay agreement was entered into, demonstrating that Kudos was aware both that time to pay arrangements were available and that interest would be charged if payments were not made on time.

11. In response to Kudos’ suggestions that their correspondence did not state sufficiently clearly that interest would definitely be charged, Mr Bates stressed that the statements in HMRC’s correspondence could not say that interest definitely would be charged, because that depended on the future actions of the taxpayer; a first penalty notice like the one sent to Kudos on 28 May 2010 could result in no penalty being due if a taxpayer paid all PAYE for subsequent periods on time.

12. HMRC referred to their letter of 28 May and a number of follow up conversations with Kudos representatives, including Mr Barrett (from October 2010 to March 2011) which should have made Kudos aware that interest was accruing. They also referred to the four computer generated notices (5 July 2010, 4 October 2010, 3 March 2011 and 29 March 2011) which should have put the taxpayer on notice of the implications of late payment.

Decision

13. While the Tribunal understood Kudos’ frustrations with the way in which the penalty changes had been communicated by HMRC, the Tribunal concluded on the basis of the recent Upper Tier Tribunal decision in *Hok (HMRC v Hok Limited* [2012] UKUT 363 (TCC)) that the matters raised by Mr Barrett were ones of administrative law, relating to whether HMRC had acted fairly in notifying Kudos of the penalties which were due, and were therefore not within the jurisdiction of this Tribunal to consider.

14. A number of recent cases have considered whether the First tier Tribunal’s remit extends to considering the manner in which penalties are applied, and particularly HMRC’s historic practice of delaying the issue of penalty notices for PAYE payments, as occurred here. The decision in *Oxfam (Oxfam v Revenue and Customs Commissioners* [2010] STC 686) seemed to suggest that the Tribunal could consider issues of this type to the extent that they were directly related to a disputed amount of tax due, where the amount of tax due was clearly within the jurisdiction of the Tribunal.

15. The most recent consideration of the Tribunal’s jurisdiction is the *Hok* decision, the relevant facts of which are not dissimilar to Kudos’ case. The *Hok* decision makes

very clear that the jurisdiction of the Tribunal is specifically limited by statute and, while it can adjust or set aside penalties as provided by specific legislation, it has no statutory power to discharge or adjust a penalty only because it is perceived to be unfair. This is the basis of Kudos' arguments here.

16. The Upper Tribunal in *Hok* concluded that the remedy for complaints of this nature against HMRC should be by way of judicial review, through the administrative courts. This Tribunal does not have any judicial review jurisdiction. The Upper Tribunal also made clear that it was not possible to circumvent the limited powers of the First tier Tribunal by reference to common law principles of fairness

17. On this basis this appeal is dismissed.

18. 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.

**RACHEL SHORT
TRIBUNAL JUDGE**

RELEASE DATE: 18 April 2013