



TC02671

Appeal number: TC/2012/10880

*Income tax – penalty for late payment of PAYE – whether reasonable
excuse – held, no – appeal dismissed and penalty confirmed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

OM CARE LIMITED

Appellant

- and -

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

**TRIBUNAL: ANNE REDSTON (TRIBUNAL
PRESIDING MEMBER)
TOBY SIMON**

Sitting in public at 45, Bedford Square, London on 31 January 2013

Bipin Patel, director of the Appellant, for the Appellant

**Karen Weare, of HM Revenue and Customs Appeals and Reviews Unit, for the
Respondents**

DECISION

1. This was the appeal by OM Care Limited (“the company”) against a penalty of
5 £2,502.27 for late payment of monthly Pay As You Earn (“PAYE”) and Class 1
employees’ National Insurance Contributions (“NICs”) during the year to 5 April
2012¹.

2. It was accepted that PAYE payments had been made late for all but one month
of the tax year. The issue in the case was whether the company had a reasonable
10 excuse for the late payments.

3. The Tribunal gave its decision orally at the end of the hearing. We decided that
the company did not have a reasonable excuse. We dismissed the appeal and
confirmed the penalty.

4. The parties agreed that pursuant to Rule 35(3) of the Tribunal Procedure (First-
15 tier Tribunal) (Tax Chamber) Rules 2009 (“the Tribunal Rules”) that it was
unnecessary for the Tribunal’s written decision to include full or summary findings of
facts and reasons for the decision. Such a decision is known as a “short decision”.

5. However, after receiving the short decision, Mr Patel asked for full written
findings of fact and reasons for the decision (a “full decision”), as he is entitled to do.
20 This is that full decision.

The legislation

6. Penalties for late payment of monthly PAYE came into effect from 6 April
2010. The relevant legislation is at Finance Act 2009, Schedule 56 (“Schedule 56”).
The structure of the regime is as follows:

- 25 (1) if payments of PAYE and employees’ NIC are late for one month in a tax
year, there is no penalty;
- (2) if two to four months’ payments are late, the penalty is 1% of the total
PAYE and NICs for the tax year;
- (3) if five to seven months’ payments are late, the penalty rises to 2%;
- 30 (4) if eight to ten months’ payments are late, the penalty rises further to 3%;
- (5) if eleven or twelve months’ payments are late, the penalty is 4%.

7. However, following the case of *Agar v R&C Commrs* [2011] UKFTT 773 (TC)
 (“*Agar*”), HMRC have accepted that the legislation does not allow a penalty to be
charged for a Month 12 late payment.

¹ References in this decision notice to PAYE should be read as including employee Class 1 NICs,
unless the context otherwise requires.

8. The provisions of Schedule 56, so far as relevant to this decision, are set out in the Appendix.

9. The Social Security Contributions Regulations 2001 (SI 2001/1004), Regulation 67A state that Schedule 56 applies to Class 1 employee NICs.

5 **The evidence**

10. Mr Patel gave oral evidence to the Tribunal and was cross-examined by Mrs Weare. He also answered questions from the Tribunal.

11. HMRC provided a bundle which included the correspondence between the parties together with the following documents:

10 (1) Calculation schedules of the company's 2011-12 PAYE and NICs by tax month showing the number of days the payments had been made late.

(2) Computer printouts of the company's PAYE and National Insurance Contributions for 2011-12.

15 (3) Copies of computer print outs headed "Action History" for 2009-10, 2010-11 and 2011-12. These included notes of telephone calls between HMRC and representatives of and for the company as well as other communications and actions.

(4) A page headed "summary of HMRC Contact with Employer".

20 (5) Template examples of: the HMRC Notice requiring payment (P101(d)); the Penalty default warning letter and the Penalty Notice for late PAYE payment.

(6) A computer printout recording the issue of a penalty default letter to the company.

25 (7) Extracts from HMRC's online guidance and from their Employer Bulletin relating to the payment of PAYE.

12. On the basis of that evidence we find the facts set out in the next two sections of this Decision. The key factual matter in dispute was whether or not HMRC informed the company that it did not have to pay penalties (as Mr Patel submitted) or whether HMRC had warned the company that it was at risk of penalties (as Mrs Weare submitted). We deal with that issue separately. We first set out all other findings of fact.

Main findings of fact

35 13. The company contracted with Bracknell and Wokingham borough councils ("the Councils") to provide care services. Mr Patel took over the company in March 2010.

14. During 2011 the Councils frequently paid the company late. The company retained a working capital balance of around £70,000 in order to pay its staff and meet other costs.
- 5 15. On 11 February 2011 Mr Patel informed HMRC that he had discovered that the book-keeper had not been making the PAYE payments as he should have done. He was warned of legal action, interest and surcharges.
16. On 4 March 2011 he advised HMRC that he would make three catch up payments for the 2010-11 tax year, covering the amounts due for all months up to and including Month 9. He was warned of legal action and penalties.
- 10 17. Month 1 of the 2011-12 year was due for payment on 22 May 2011. No payment was received by HMRC. On 1 June 2011 HMRC called the company and were told that the director was away until 2 June.
- 15 18. Month 2 was due for payment on 22 June 2011, but the PAYE was not paid by that date. On 6 July 2011 HMRC made a distraint call to the business premises. The HMRC officer was told that Mr Patel was “normally in but not today” and that no-one else could deal with financial issues. The officer gave a distraint warning letter to a company employee; he also advised that Mr Patel should make contact with HMRC.
- 20 19. On 7 July 2011 Mr Patel called HMRC to say he had paid Month 1 by BACS and advised that he would be late paying Months 2 and 3. The Month 1 payment was not in fact made on that day.
20. On 12 July 2011 HMRC made a further distraint call to the company but was told that the director “had not arrived yet”. A county court proceedings letter was left with an employee.
- 25 21. Payment for Month 1 cleared HMRC’s bank account on 14 July 2011, 53 days late.
22. For the other months we were provided with various payment dates by the parties. We have accepted the evidence provided by Mr Patel in his appeal to the Tribunal as being the dates on which the payments were made by him.
- 30 23. On that evidence, the payment for Month 2 was paid 16 days late, Months 3 and 4 were paid 13 days late, Month 5 was paid 17 days late and Month 6 was paid 18 days late. Month 7 was 10 days late, and Month 8 was paid on time. Months 9, 11 and 12 were all paid 1 day late, and Month 10 was paid 10 days late.
- 35 24. HMRC’s figures differ for some months, perhaps because of a delay in the money clearing HMRC’s bank accounts a few days after the dates provided by Mr Patel. But both parties agree that all months except Month 8 were paid late.
25. There were further conversations between Mr Patel and HMRC on 29 November 2011 (when HMRC called Mr Patel and were told that there was a

cashflow problem) and on 5 December 2011 (when Mr Patel called HMRC and told them there was “a problem getting the money in”).

5 26. On 24 February HMRC called the company, chasing the late payment for Month 10. They left an answerphone message asking the director to call back but no callback was made.

27. On 14 August 2012 HMRC issued a penalty of £2,502.47. On 24 August 2012 Mr Patel appealed the penalty on the company’s behalf. Following a statutory review, an appeal was made to the Tribunal on 6 December 2012.

Findings of fact about HMRC’s advice on penalties

10 28. Mr Patel submitted that he had contacted HMRC regarding the company’s cashflow problems and had kept them informed “at every point”. He said that he had been told by HMRC that as long as he cleared the backlog of underpayments there would be no penalty. He had worked to clear the backlog and had done so. Under
15 cross-examination from Mrs Weare he said it was “too long ago” to remember the dates or times of the conversations.

29. Mrs Weare submitted that HMRC had not promised that there would be no penalties. In particular:

20 (1) HMRC had issued a penalty warning letter on 27 May 2011. This warned the company about the penalties, and provided links to online guidance about penalties and other matters.

(2) On 29 November 2011 and 5 December 2011 the HMRC telephone records company explicitly state that the company was warned about penalties.

(3) There is no mention in those contemporaneous records of HMRC agreeing to waive any penalties.

25 30. The Tribunal notes that the evidence provided by HMRC consists of two contemporaneous telephone notes, both of which make reference to penalties, and a ‘penalty warning letter’, the text of which was provided to the Tribunal. Mr Patel did not provide a record of any particular conversations in which the promise not to impose penalties was made.

30 31. The Tribunal can only make its decisions on the evidence, and having weighed the evidence provided, we find that HMRC did not promise that there would be no penalties.

Mr Patel’s submissions on behalf of the company

35 32. As stated above, Mr Patel said that he had understood that there would be no penalties if he cleared the backlog. He submitted that this provided the company with a reasonable excuse.

33. Mr Patel stated that the root cause of the problem was the failure of the Councils to pay his company on time. He understood that the Councils had difficulties because they had put their money into Icelandic banks and could not recover it. As a result, payments were delayed by a month or more. The Councils were paying the invoices later than they were obliged to do by law². He said that these late payment problem provided the company with a further reasonable excuse.

34. Finally, he told the Tribunal that “had I known there was to be such a huge penalty I would have got money from the bank” and that the bank would have provided funds on the security of the invoices he had submitted to the councils.

10 **Mrs Weare’s submissions on behalf of HMRC**

35. Mrs Weare said that the company did not have a reasonable excuse for the late payments. Insufficiency of funds cannot be a reasonable excuse “unless attributable to events outside the taxpayer’s control.” It is clear on the evidence that the company could have obtained funds if it had asked the bank.

15 36. As set out earlier in this Decision, Mrs Weare also said that the HMRC records of phone conversations, taken together with the other evidence, showed that the company had been warned of penalties. It was not the case that Mr Patel had been told that he could simply clear the backlog and so avoid any penalties. If this was his understanding, it was not reasonable, based on the evidence, and so could not provide him with a reasonable excuse.

Discussion

37. The company had three possible grounds for a reasonable excuse defence:

- (1) Insufficiency of funds
- (2) Mr Patel’s belief that no penalty would be charged
- 25 (3) Mr Patel’s failure to realise the severity of the penalty.

38. Taking these in turn, we agree with Mrs Weare that insufficiency of funds did not constitute a reasonable excuse because the situation was not outside the company’s control. It could have asked the bank for a loan, or otherwise factored the debts. Mr Patel gave clear evidence to this effect.

30 39. For completeness, we note that any breach by the Councils of their statutory payment obligations was not a relevant factor in the context of our decision. Where there is an insufficiency of funds, the test in Schedule 56 will only be satisfied if that insufficiency was “attributable to events outside the company’s control”.

35 40. The second issue was more difficult. We found Mr Patel to be an honest and straightforward person, and we accepted that he genuinely believed that, if he did his best to catch up with the late payments, he would not have to pay a penalty. However,

² The Late Payment of Commercial Debts (Interest) Act 2008

we have also found as a fact, based on the contemporaneous records provided by HMRC, that he was warned of penalties.

41. In the case of *Coales v R&C Commrs* [2012] UKFTT 477(TC) the Tribunal (Judge Brannan) considered whether an honest and genuine belief is sufficient to provide the taxpayer with a reasonable excuse. At [28] Judge Brannan cites the guidance provided by Judge Medd in *The Clean Car Co Ltd v Customs and Excise Comrs* [1991] VATTR 234. That guidance includes the following passage:

10 “One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?... It seems to me that Parliament in passing this legislation must have intended that the question of whether a particular trader had a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but who in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered.”

20 42. Agreeing with that guidance, Judge Brannan says at [32]:

25 “The test contained in the statute is not whether the taxpayer has an honest and genuine belief but whether there is a reasonable excuse. It is true that the absence of a genuine and honest belief would usually indicate that the excuse could not be reasonable, but its presence does not mean that the excuse is necessarily reasonable.”

43. At [34] Judge Brannan cites the judgment of Lord Rodger of Earlsferry, delivering the judgment of the Judicial Committee at [76]-[77] in the case of *R v K* [2001] 3 All ER 897. He concludes that the House of Lords (albeit in a different statutory context) found that a “reasonable excuse” must be objectively reasonable and that test must be applied to the facts of the individual case.

44. This Tribunal respectfully agrees with Judge Brannan’s analysis in *Coales*. We too find that the test to be applied is whether Mr Patel’s belief was objectively reasonable, given all the facts of this case.

35 45. We have found as a fact that HMRC warned the company several times that it was risking penalties. In our judgment, it was not objectively reasonable for a taxpayer in Mr Patel’s position to believe that, if he continued to pay late, the company would not incur penalties. We thus find that his belief, albeit genuine, does not provide him with a reasonable excuse.

40 46. Finally, we consider whether Mr Patel’s failure to realise the severity of the penalties can provide the company with a reasonable excuse. In *Agar* the Tribunal (Judge Pool and Ms Tanner) said, at [50]:

5 “The Appellant was very well aware of its obligations and of the fact that it was defaulting. What it really complains of is that it did not realise the full implications of its actions, in terms of the new penalties they would attract. Effectively [the Appellant’s representative] was arguing that the Appellant should be excused from the penalty by reason of its ignorance of the law. It is a long established principle of English law that this argument is doomed to fail.”

10 47. We respectfully agree with the Tribunal in *Agar*. We also find that the failure to realise the severity of the penalties cannot provide the company with a reasonable excuse.

Decision and appeal rights

48. As a result of the foregoing, we find that the company does not have a reasonable excuse. We dismiss the appeal and confirm the penalty of £2,502.47

15 49. 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.

20 50. 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.

25

**ANNE REDSTON
TRIBUNAL PRESIDING MEMBER**

RELEASE DATE: 25 April 2013

30

**FINANCE ACT 2009, SCHEDULE 56
PENALTY FOR FAILURE TO MAKE PAYMENTS ON TIME**

Penalty for failure to pay tax

5

1 (1) A penalty is payable by a person ("P") where P fails to pay an amount of tax specified in column 3 of the Table below on or before the date specified in column 4.

(2) Paragraphs 3 to 8 set out—

10

(a) the circumstances in which a penalty is payable, and

(b) subject to paragraph 9, the amount of the penalty.

(3) If P's failure falls within more than one provision of this Schedule, P is liable to a penalty under each of those provisions.

15

(4) In the following provisions of this Schedule, the "penalty date", in relation to an amount of tax, means the date on which a penalty is first payable for failing to pay the amount (that is to say, the day after the date specified in or for the purposes of column 4 of the Table).

	<i>Tax to which payment relates</i>	<i>Amount of tax payable</i>	<i>Date after which penalty is incurred</i>
PRINCIPAL AMOUNTS			
1	Income tax or capital gains tax	Amount payable under section 59B(3) or (4) of TMA 1970	The date falling 30 days after the date specified in section 59B(3) or (4) of TMA 1970 as the date by which the amount must be paid
2	Income tax	Amount payable under PAYE Regulations	The date determined by or under PAYE regulations as the date by which the amount must be paid
3-24		

2 – 4

Amount of penalty: PAYE and CIS amounts

20

5 (1) Paragraphs 6 to 8 apply in the case of a payment of tax falling within item 2 or 4 in the Table.

(2) ...

6

(1) P is liable to a penalty, in relation to each tax, of an amount determined by reference to—

25

(a) the number of defaults that P has made during the tax year (see subparagraphs (2) and (3)), and

(b) the amount of that tax comprised in the total of those defaults (see subparagraphs (4) to (7)).

5 (2) For the purposes of this paragraph, P makes a default when P fails to make one of the following payments (or to pay an amount comprising two or more of those payments) in full on or before the date on which it becomes due and payable—

(a) a payment under PAYE regulations;

(b) a payment of earnings-related contributions within the meaning of the Social Security (Contributions) Regulations 2001 (SI 2001/1004)...

10 (3) But the first failure during a tax year to make one of those payments (or to pay an amount comprising two or more of those payments) does not count as a default for that tax year.

(4) If P makes 1, 2 or 3 defaults during the tax year, the amount of the penalty is 1% of the amount of the tax comprised in the total of those defaults.

15 (5) If P makes 4, 5 or 6 defaults during the tax year, the amount of the penalty is 2% of the amount of the tax comprised in the total 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 the tax comprised in the total of those defaults.

20 (7) If P makes 10 or more defaults during the tax year, the amount of the penalty is 4% of the amount of the tax comprised in the total of those defaults.

(8) For the purposes of this paragraph—

(a) the amount of a tax comprised in a default is the amount of that tax comprised in the payment which P fails to make;

25 (b) a default counts for the purposes of subparagraphs (4) to (7) even if it is remedied before the end of the tax year.

7-10

Assessment

11 (1) Where P is liable for a penalty under any paragraph of this Schedule HMRC must—

30 (a) assess the penalty,

(b) notify P, and

(c) state in the notice the period in respect of which the penalty is assessed.

35 (2) A penalty under any paragraph of this Schedule must be paid before the end of the period of 30 days beginning with the day on which notice of the assessment of the penalty is issued.

(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

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

(4)-(5)

12-15

Reasonable excuse

10 16 (1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a payment if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.

(2) For the purposes of sub-paragraph (1)—

15 (a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control,

(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and

20 (c) 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 ceased.