



TC02699

Appeal number: TC/2012/01017

*PAYE – appeal against the penalty imposed for the late payment of PAYE-
Schedule 56 Finance Act 2009- director of appellant diagnosed with
terminal disease – appeal allowed in part*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ALL DAY RECRUITMENT SERVICES LTD

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE SANDY RADFORD
TOBY SIMON**

Sitting in public at Bedford Square, London on 14 February 2013

Mandeep Sehmi for the Appellant

Jake Hillier, officer of HMRC, for the Respondents

DECISION

1. This is an appeal against the penalty of £12,478.45 imposed for the late payment of PAYE in each month of tax year 2010/11. The penalty in respect of month 12 was removed as a result of the decision in the *Agar* case.

2. Mr Dickinson and his wife, directors of the appellant, gave evidence for the appellant.

Legislation

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.

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.

(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.

5. 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

(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
- (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.

(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.

35 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. Mr. and Mrs. Dickinson started the company in 2003. They are both directors of the company. After the birth of their second child in 2003, Mrs. Dickinson stepped away in order to look after the family and became a full time home maker. Since then, whilst Mrs Dickinson remained a director, Mr. Dickinson has been the sole person directing and running the business.

10 10. The managing director, Mr. Dickinson, was the only person managing the company at the relevant time and was responsible for making the payments on time.

15 11. In May 2006, Mr. Dickinson was diagnosed with cancer in the left knee. This was classified in medical terms as "grade 2". This meant that the cancer cells were faster growing, with more varied and abnormal looking cells and was much more likely to invade the surrounding tissue, lymph nodes and organs. It was life-threatening.

12. The treatment of the cancer required it having to be curretted and thereafter, Mr. Dickinson underwent physiotherapy. It was necessary to regularly monitor him by way of 3 monthly X-rays, CT and MRI scans and blood tests. There was uncertainty as to whether the cancer would come back or not.

20 13. Mr Dickinson gave evidence that after the operation, he tried to return to work but only managed a couple of days before he was unable to cope. Thereafter, he did not attend the office very often, and turned into what he and Mrs. Dickinson identify as a hypochondriac - constantly monitoring his blood pressure and suffering anxiety attacks. He sought medical assistance, whereby, the doctor prescribed anti depressants
25 and urged him to attend counselling - which he did. He continued to be anxious and became unable to stand in a room full of people or hold business meetings. He lost his confidence completely and had no interest or enthusiasm left for anything outside his family. He was totally obsessed by his condition.

30 14. Mr. Dickinson placed a manager in charge of the business and took a step back. Work matters, such as signing of cheques, would be brought to him at home. Often the figures would be found to be incorrect and had to be re-done. He paid the PAYE once the figures had been established.

35 15. In February 2009, Mr. Dickinson was re-diagnosed with the cancer, which was again "grade 2". It was an emergency situation and following urgently arranged scans that very day, he was rushed into hospital the next day for a full knee replacement. He was told that the worst outcome would be the removal of his entire left leg. His complete left knee was removed and a Smiles' rotating hinge prosthesis put in situ. He remained in the hospital as an in-patient for 1 week and, thereafter, carried on treatment as an out-patient.

16. A letter dated 08/02/2012 from Professor T. W. R. Briggs who is the consultant orthopaedic surgeon who carried out the operation and under whose care Mr. Dickinson remains, was produced to the Tribunal.

5 17. Mr. Dickinson stated that his condition had become such that he was unable to go to work or even face going to work. As a result, the business suffered and he was rendered incapable of competent management. He felt that he had no control over anything and was struggling to cope, but, nevertheless, he tried his best in the circumstances. Everything necessary was brought to him to deal with at home. As before, the PAYE payments continued to be paid by him. He was totally dependent on
10 his manager who brought the figures to him at home, which then enabled him to make the payments which remained his ultimate responsibility.

18. However Mr Dickinson remained the only person who could sign the cheques for the PAYE payments although the employees were paid automatically electronically.

15 19. Mr Dickinson stated that he had needed to take a step back away from the pressures of work. He did not therefore keep up with any new regulations or developments that were taking place. He certainly had no knowledge of the new penalty regime that was to come into force in April 2010. He is not sure that he would have been capable of doing anything differently even if he had known as his mental
20 state was very poor.

20. At end of December 2010 there were staffing problems and Mr Dickinson had to change the manager as the previous one was not working well.

21. As a result of Mr Dickinson's mental demeanour, he remained away from work and took a number of trips to Florida in order to recuperate.

25 22. On 26 May 2010 when HMRC spoke to Mr Dickinson he informed them that he had been on holiday and this was when Mr Dickinson was in Florida, recuperating and getting follow-up treatment at the Mayo Clinic.

30 23. The HMRC log of 26 July 2010 recorded Mr Dickinson having promised to make a payment and also having said that he would not be told when to pay and that he would make a payment as and when he saw fit.

35 24. The HMRC log dated 31 January 2011 stated that Mr Dickinson indicated that "cash flow" was the reason for late payment. It is also indicated that Mr Dickinson rang back saying that he wished to avoid any penalties and that the appellant was waiting for payments from customers and that he would look into setting up a direct debit. However Mr Dickinson stated that he had no recollection of these conversations.

Appellant's submissions

25. Mr Sehmi submitted that Mr Dickinson had not been to the office often and his condition had necessitated his having to take a step back from responsibility. He was

unable to manage the business as well as he could have, had he not been incapacitated by his afflictions and their effect on him. He could not keep up with any new developments in the tax regime or otherwise. He certainly could not run the business anymore. He tried the best he could in the circumstances, but was unable to cope by his own admission. It was never his intention to put himself in a position whereby he would have to pay a penalty nor did he ever intend not to pay - which is evidenced by the fact that worst scenario of lateness was a payment being made 13 days after the due date. He just could not get it right in the circumstances at the time.

26. Mr Sehmi submitted that Mr Dickinson was the company as his wife and co-director was too busy with the children.

27. The HMRC log reports that Mr Dickinson said, on a query as to why he did not pay on time that he had been away on holiday and did not want to think of payments owed. What was meant was that he was away recuperating, his mind needed a break, all he could think about was his illness and that he could not think of anything else. Being anxious and highly stressed, he may not have communicated it like this or in this detail.

28. The log of 26 July 2010 records Mr Dickinson having promised to make a payment and also having said that he would not be told when to pay and that he would make a payment as and when he saw fit. Mr Sehmi submitted that this was a clear indication of his frame of mind Mr Dickinson was in, totally unable to cope with situations. At the time, he must have felt harangued, felt that he was seriously ill with cancer and that it counted for nothing. He was trying his best and just now wanted to be left alone.

29. Mr Sehmi submitted that the first time that Mr Dickinson realised that a penalty was being levied was when the penalty notice dated 12 July 2011 was brought to his attention and he sought the assistance of his accountants. For some reason, it had not registered that he could potentially be fined before this. His state of mind may not have helped.

30. In their letter dated 14 September 2012, which was the decision in the internal appeal against the penalties which are the subject-matter of this appeal, Mr Sehmi submitted that HMRC failed to take into sufficient consideration the most significant factor in this case which was the diagnosis of cancer and its resulting effect on Mr. Dickinson. Furthermore, they failed to enquire as to any further steps that Mr. Dickinson may have taken to ensure compliance. Mr Sehmi submitted that the decision was therefore wrong both in law and in principle.

31. Mr Sehmi submitted that in the letter dated 1 December 2011, which was the communication of the result of the internal review requested by the appellate, HMRC's focus was on the appellant's payment history in previous years. He submitted that this was wrong in law as it was an irrelevant factor to take into account being not the period in question and being a period where the tax regime now in place and the subject-matter of these proceedings was not in existence. Therefore, a comparison of the two was incompatible as well as irrelevant. He submitted that HMRC had made an

assumption of failure which was both unfair and wrong in law and a misreading of the law. The focus should have been on whether there was a reasonable excuse in the relevant period and the test was he submitted, therefore misapplied.

5 32. Referring to the case of *P C Clarke* as cited by HMRC Mr Sehmi pointed out that Mr Clarke's problems were physical and not mental as were Mr Dickinson's.

10 33. Furthermore, and more significantly, even if the test was not wrongly applied, which it is strongly argued it was, HMRC totally failed to take into consideration the fact that the cancer, and its mental affect on Mr. Dickinson, was very much a live factor in the previous years as well. Indeed, the aggressive return of the cancer was in 2009 and was when the drastic surgery had to be undergone. This further negated the findings of the HMRC in this review.

15 34. Lastly, HMRC applied the wrong test in any event. In the letter the test was stated as: "Reasonable excuse is normally something unforeseeable or beyond the persons control which prevents him in complying with an obligation when he otherwise would have done." Nevertheless, it was held in *HMD Response International v HMRC* FTT (TC 1322), [2011] SFTD 1017, that the phrase "reasonable excuse" cannot be extended to demanding that a taxpayer demonstrate that there were exceptional circumstances or some exceptional event beyond his control before a reasonable excuse can be established.

20 35. Finally Mr Sehmi submitted that the facts affecting Mr. Dickinson over the relevant period were such as to allow the Tribunal to reach a finding of "reasonable excuse" in relation to the late payments and to quash the penalties imposed. Mr Dickinson's mental state was very much prevalent over the entire period and was applicable to all the respective late payments.

25 **HMRC's submissions**

30 36. Mr Hillier submitted that the appellant had repeatedly failed to meet its payment obligations, not just within the penalty period but also in the previous years. In the years 2008 -2009 and 2009 -2010 all the PAYE payments were late and it was only on the one occasion, 3 February 2010 that the director said the late payments of PAYE were due to illness. Mr Hillier submitted that in no other telephone conversations following this was illness given as a reason for paying late.

35 37. He submitted that on the 25 May 2010, Mr Dickinson said the payment was late due to holidays. On 25 November 2010 Mr Dickinson said the payment was late as it had been overlooked and on 31 January 2011, Mr Dickinson said the payment was late due to cash flow. On 25 March 2011, it was explained that the late payment was also due to holidays.

40 38. Mr Hillier submitted that no mention was made on any of these occasions that illness had affected the company's ability to meet the payment dates. There had been no evidence as to how the illness affected the company's ability to pay or how the internal affairs of this company affected the payment behaviour.

39. He submitted that there was no record in the appellant's payment history stating that there had been an unexpected event which had caused difficulty and the appellant had not contacted HMRC to discuss payment or request a payment deferment.

5 40. Mr Hillier submitted that during the tax year 2010-2011 on three occasions, the 26 July 2010, 25 November 2010 and 31 January 2011, Mr Dickinson was warned of penalties and consequently Mr Dickinson was fully aware of the statutory payment obligations and the consequences of not paying the monies owed on time. Also P101 Notices were regularly issued prior to and including the tax year 2010/2011.

10 41. In a telephone conversation 25 February 2010 Mr Dickinson was reminded of due dates for payment and warned of penalties.

42. He submitted that in a telephone call with HMRC on 26 May 2010, Mr Dickinson said that the late payment was due to him being away on holiday and he did not want to think about payments owed.

15 43. He submitted that in the telephone conversation on 26 July 2010, Mr Dickinson promised to send a cheque for the payment and the call recorded Mr Dickinson saying he would make payments as and when he saw fit and that he would not be told when to make payment. Mr Hillier contended that therefore the fact that the payments were late appeared to have been a matter of choice for the appellant and not as a result of the director's ongoing illness.

20 44. Mr Hillier referred to the decision in the case of *P C Clarke v HMRC* [2011] UKFTT 427 (TC) when Judge Hellier stated:

25 60. But, as the chronology above shows, Mr Clarke had long notice of HMRC's wish to see these documents. Even though it may have been reasonable at a particular time for Mr Clarke not to produce the documents because he could not crawl into a loft, there comes a time when even if he could not do it himself it becomes reasonable to expect him to find a way for someone else to do it on his behalf. At some time it could well become reasonable for him to have the underlying room scaffolded to support the loft floor so that it would be safe for someone else to crawl into the loft.

30 61. The question is when that time comes. That depends in part on the exact configuration of the loft space (hence another need for a site visit or equivalent evidence), it also depends upon the amount of time which had passed since Mr Clarke became aware of HMRC's desire to see the documents, and it depends on the progress of Mr Clarke's health.

35 62. Given that Mr Clarke's back problems started at about the time of the giving of the notice, it seemed to us that it was reasonable to allow some time for the progress of his health to improve, but that there would come a time, when if it had not improved sufficiently, the excuse would run out. In our view he had a reasonable excuse for his failure to provide the invoices and that excuse was continuing at the time of the tribunal hearing, but, although we could not bind another tribunal, had we heard this case in 40 January 2012 on the facts as we understand or assume them to be, we may well not then find that a reasonable excuse existed.

45. Mr Hillier submitted that by July 2010 the time had come when Mr Dickinson should similarly have found a way for someone else to deal with the PAYE payments on his behalf.

46. Mr Hillier also referred to the decision in the case of *Mrs Renu Sekhri v HMRC* [2011] UKFTT 747 (TC) when Judge Walters stated that:

The Tribunal accepts HMRC's submission that to accept an illness as a reasonable excuse for not submitting a tax return by the statutory due date the illness must have been so serious that it prevented the taxpayer from controlling her business affairs immediately before the filing date and from that date until the time when the return is received, and in circumstances where it would be unreasonable to expect that alternative arrangements or processes would have been put in place to meet the taxpayer's statutory obligations.

47. Mr Hillier submitted that similarly alternative arrangements should have been put in place by either Mr or Mrs Dickinson.

48. He pointed out that Mr Dickinson regularly returned the phone calls of HMRC and was therefore aware that the payments were late. In any event Mr Hillier submitted that ignorance of the law was not a reasonable excuse.

Findings

49. The Tribunal had much sympathy for Mr Dickinson however we noted that payments were made every month albeit that they were late. We found therefore that Mr Dickinson was fully aware of the need to pay the PAYE every month.

50. The Tribunal found that whilst the appellant initially had a reasonable excuse for the late payments whilst Mr Dickinson was in Florida having treatment, this excuse did not continue after HMRC had again spoken to Mr Dickinson on 26 July 2010.

51. The Tribunal found that it was the responsibility of the directors to ensure that payments were made on time and that sufficient warnings were given to Mr Dickinson to alert him to the situation.

52. The Tribunal found that if Mr Dickinson felt unable to deal with work matters he should have made alternative arrangements far sooner. We noted that the disclosed medical records showed that Mr Dickinson was diagnosed with various anxiety disorders but did not consider that we were given medical evidence that established that those anxiety disorders prevented him from working effectively, much though he protested about his poor health. We noted that he had been prescribed Citalopram which is an anti-depressant but is also used to treat anxiety disorders. We noted that his cancer had been treated successfully a year before the tax year in question and while he needed check-ups he was not in active treatment for the cancer.

53. The Tribunal found that whilst Mrs Dickinson remained a director it was equally her responsibility to make sure that the appellant met its obligations, in particular whilst she knew that her husband was not able to cope. The Tribunal noted

that on at least one occasion Mrs Dickinson using her maiden name, spoke to HMRC about the PAYE.

54. In recognition of the appellant's reasonable excuse in respect of the first three months of the tax year, we found that the penalty in respect of the first three months should be cancelled making month 4 the first default, which is ignored, and leaving the penalties in place in respect of months 5, 6, 7, 8, 9 and 11.

Decision

55. The penalties in respect of months 1, 2 and 3 are hereby cancelled. The penalties in respect of months 5, 6, 7, 8, 9 and 11 are hereby confirmed.

56. 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.

**SANDY RADFORD
TRIBUNAL JUDGE**

RELEASE DATE: 9 May 2013