



TC02838

Appeal number: TC/2013/01910

INCOME TAX – penalties for late payment of PAYE – whether reasonable excuse – No – Schedule 56 Finance Act 2009. Appeal dismissed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MONGOOSE PLASTICS LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE W RUTHVEN GEMMELL WS
CHARLOTTE BARBOUR CA, CTA**

Sitting in public at George House, 126 George Street, Edinburgh on 2 July 2013

Mr George Cameron and Mrs Jean Cameron for the Appellant

Elizabeth McIntyre, Officer of HMRC, for the Respondents

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DECISION

5

Introduction

1. This is an appeal by Mongoose Plastics Limited ("MP") against a penalty determination issued by The Commissioners for Her Majesty's Revenue and Customs ("HMRC") for the late payment of PAYE for the tax year 2011-2012.

10 Legislation

Finance Act 2009 Section 107 (as amended by the Finance (No.3) Act 2010)

Schedule 56

15 Penalty for Failure to Make Payments on Time

Penalty for failure to pay tax

1

20 (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—

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

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

25 (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.

30 (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 |
|--------------|---|---|

2 ...

3 ...

4 ...

Amount of penalty: PAYE and CIS amounts

5

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) But those paragraphs do not apply in the case of a payment mentioned in paragraph 3(1)(b) or (c).

10 **6**

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

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

15 (b) the amount of that tax comprised in the total of those defaults (see sub-paragraphs (4) to (7)).

(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—

20 (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);

25 (c) a payment due under the Income Tax (Construction Industry Scheme) Regulations 2005 (SI 2005/2045);

(d) a repayment in respect of a student loan due under the Education (Student Loans) (Repayments) Regulations 2009 (SI 2009/470) or the Education (Student Loans) (Repayments) Regulations (Northern Ireland) 2000 (SR 2000 No 121).

30 (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.

35 (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.

5 (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;

10 (b) a default counts for the purposes of sub-paragraphs (4) to (7) even if it is remedied before the end of the tax year.

(9) The Treasury may by order made by statutory instrument make such amendments to sub-paragraph (2) as they think fit in consequence of any amendment, revocation or re-enactment of the regulations mentioned in that
15 sub-paragraph.]

The Facts

2. MP is a company trading from Glenrothes in Fife.

3. Evidence was submitted of each tax month's due date and the actual payment
20 dates for the tax years 2011-2012 which showed a repeated pattern of late payments. Nine of the 12 payments were over ten days late in being made; one was four days late and the other nine days late.

4. It was established that for the 20 years previous to 2011, MP always paid its tax at
25 the end of each month around the 30th, following the due date of the 19th, and continued to do so during the tax year 2011-2012 until the payment due on 19 April which was paid on time.

5. MP stated they were not aware of the new penalty system and were shocked when they received the penalty notice.

6. The relevant date for making payment by cheque which was MP's preferred
30 method of payment was the 19th of each month. Since becoming aware of the new rules, MP say they have paid on time.

7. The penalty was calculated in the sum of £2,000.12 on the basis that there were 11 instances of failure to pay on time but, effectively, ten defaults as the legislation excludes the first failure to pay on time.

35 8. The total amount of PAYE tax that was paid late was £50,003.16 and the default penalty was 4% of that amount charged under paragraph 6 of Schedule 56 of the Finance Act 2009.

9. HMRC stated that they are only able to calculate the correct percentage amount of
40 penalty after the end of the tax year once it has been established how many monthly defaults had occurred because the charge is based on the cumulative number of

defaults and that they sent a PAYE – Late Penalty Warning letter on 27 May 2011 to MP.

10. HMRC led evidence to show the address of MP which was their correct address.

5 11. MP wrote on 27 September 2012 setting out the reasons why they did not believe they were liable, stating that they were "disgusted" to receive the Penalty Notice for late payment of PAYE and asking "why have we not been informed in writing there 'WOULD' be a charge if not paid by 19th and not as your explanation in clause 8 which certainly does not make sense. Why are you trying to penalise the companies who make their payments EVERY SINGLE MONTH albeit a few days late? Why, 10 when your staff telephoned to chase payment, they do not inform (*sic*) companies about this change in the law?"

15 12. On 2 October 2012, HMRC wrote to MP in relation to the appeal against the decision to issue a PAYE late payment penalty. The letter stated "We can cancel a penalty if you have a reasonable excuse for paying your PAYE late. I have considered your reasons for disagreeing with our decision to charge a penalty, however, I am unable to accept these reasons as a 'reasonable excuse' for paying late".

20 13. The letter continued "Legislation and all of HMRC's employer external guidance states what the due dates for payment are. Cheque payments need to be with HMRC by the 19th..... This legislation applies to all months and not just month 12. I have checked your payments and can confirm that on nine occasions payment was not received until the beginning of the following month. Employers are supposed to pay upon time without warnings. However, your office was telephoned on 25 May 2011 after payment for month 1 was overdue. During the telephone conversation Jean Cameron was warned of late payment penalties. On 27 May 2011 a default warning 25 letter was issued. This letter would have warned if payments continued to be late, you might be eligible for late payment penalties. The purpose of this letter is to encourage employers to comply by paying over their employee deductions on time to avoid penalties being raised".

30 14. It continued, "On three occasions, month 4, 8 and 11, your office was telephoned and a message was left for a director to return the call".

35 15. On 8 October 2012, MP replied requesting an internal review stating that they had been in business for 30 years and had paid every single month, "albeit late and this has never been a problem When your officers spoke to Jean Cameron, they stated there '**may be penalties**' they never said there was a new rule and there '**would be penalties**'".

16. MP then stated that they had struggled to keep afloat during the credit crunch and had ploughed money from their own savings to keep the loyal workforce's jobs.

17. On 29 January 2013, HMRC wrote to MP requesting any information that MP wished taken into account as part of the review.

40 18. The review letter was issued on 13 February 2013 upholding the decision to issue the penalty notice; advising that new legislation was introduced on 6 April 2010, stating that the statutory date had always been either the 19th or 22nd of each month,

depending on payment method and advising that it was not enough to pay in full, it must also be on time.

5 19. The letter stated that the penalty regime is to act as a deterrent and to encourage employers to pay on time and referred to a default warning letter of 27 May 2011 and a similar letter sent on 28 May 2010.

20. HMRC said they used the word "may", in relation to whether MP would incur a penalty, because at the point of sending the letter the company was not in a penalty situation as the first default does not attract penalty and so, if on receipt of the letter, the company had begun to pay on time, then no penalty would have been charged.

10 21. The letter continued "the law does not require HMRC to charge a penalty during the tax year, it only requires a penalty to be made on or before the later of either two years after the date that the penalty was first payable or 12 months after the end of the appeal period for the assessment of the outstanding tax or where there is no assessment, the date when the liability was established".

15 22. HMRC stated that they published the new late payment penalties for PAYE extensively before and after they came into effect and referred to the issue of businesses experiencing cash flow problems and referred to the ability to contact HMRC before the due date to request a short term "Time to Pay".

20 23. On 28 February 2013, MP responded they were unaware the new legislation had been introduced; that they had always paid at the end of every month for the past 25 to 30 years; that they were always aware that there was a penalty if you did not make the 19 April payment by the due date and if they had received a letter to say that a new legislation was introduced "they would have ensured these payments reached (*sic*) by the 19th, but as you can appreciate as it had been acceptable for almost 30
25 years we were unaware of the problem".

24. The letter of 28 February 2013 from MP also stated that if they did receive default letters on the dates indicated they likely would be ignored because the payment would have already been on its way or received by HMRC.

30 25. The letter questioned why HMRC's letter did not advise that penalties would be incurred if any future payment was received late in the tax year and, furthermore, asked why HMRC did not write to every company and advise that, if they make more than one late payment in any tax year, penalties would be applied.

MP's Submissions

35 26. MP say that they believe they have been mixed up with another company but accept that all their payments were late apart from the one due on 19 April 2013.

27. MP say they did not receive the warning letter of 27 May 2012 but they did receive the 21 September 2012 penalty notice.

40 28. MP say that for 20 years they had always paid at the end of the month, that they were not aware of the new penalty system and, if they had been, they would have paid on time.

29. MP say that HMRC should have let them know, that they are a small business and have difficulties in keeping up with the law.

30. MP stated that HMRC's record of the telephone number for the company was incorrect.

5 31. MP say that their reasonable excuse is that they were unaware that there was a new system and paid as they had done in the past.

32. MP expected to be notified of the change in the law and assumed that it was acceptable to continue paying as before.

10 33. MP say that they accept that they have to "stick by the law of the land" and, whilst accepting that their payments were late, noted that HMRC did not have a problem with this in the past.

34. MP say the reminders came after the late payment.

HMRC's Submissions

15 35. HMRC reiterated many of the comments contained in their letters of 2 October 2012 and 13 February 2013.

36. HMRC stated they had published information about late payment penalties for PAYE extensively before and after they came into effect and made reference to the HMRC Employer Bulletins which they say were sent to all PAYE employers.

20 37. HMRC say that it is the taxpayer's responsibility to keep up to date with changes which may affect them and referred to MP's letter of 28 February 2013 where they state they were unaware new legislation had been introduced until they received HMRC's letter of 21 September 2012 issuing the penalty payment.

38. HMRC refer to that letter where MP said they were always aware there was a penalty if they did not make the 19 April payment by the due date.

25 39. HMRC say that companies are required to pay on time; that the money that is due is not the company's money but belongs to HMRC.

Decision

30 40. The tax payments in the year 2011-2012, with the exception of the December payment, had not been paid on time and a penalty had, therefore, been correctly calculated in terms of the relevant legislation.

41. MP admitted in correspondence that they were not aware of the change in legislation and that they continued to make payments in the same way as they had previously done which was generally late and after each month's deadline.

35 42. The Tribunal did not consider it credible that MP had failed to receive the warning letter, the employer bulletins or other information about the new penalty regime and believed that the telephone conversations, referred to by HMRC, had taken place.

43. The Tribunal had no jurisdiction to consider whether the penalty regime was fair, excessive or unduly harsh or how it was managed.

44. The Tribunal considered that MP had been unaware of the changes in legislation and, as a consequence of continuing to make payments at the end of the month, were
5 in breach of the new penalty regime and that the penalty had been correctly calculated and was due.

45. The appeal is dismissed.

46. This document contains full findings of fact and reasons for the decision. Any
10 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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**W RUTHVEN GEMMELL
TRIBUNAL JUDGE**

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RELEASE DATE: 22 August 2013