



TC03111

Appeal number: TC/2013/04383

*PAYE – late payment of monthly PAYE – whether payments made late –
Yes. Whether appellant had reasonable excuse for the failure – No.
Whether Special reduction should apply - No.*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

G M FLOORING CONTRACTS LIMITED Appellant

- and -

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

**TRIBUNAL: PRESIDING MEMBER PETER R SHEPPARD, FCIS, FCIB, CTA
EILEEN A SUMPTER, WS**

**Sitting in Public at George House, 126 George Street, Edinburgh on Thursday
7 November 2013**

Billy Gemmell for the Appellants

Linda McGuigan, Officer of HMRC, for Respondents

© CROWN COPYRIGHT 2013

DECISION

Introduction

1. This considers an appeal against a penalty of £1,227.91 levied by the respondents for the late payment of PAYE by the appellant for seven months in the tax year 2011-2012.

Legislation

- Finance Act 2009 Schedule 56
The Finance (No.3) Act 2010 part 3 paragraph 27 and Schedule 11
10 The Finance (No.3) Act 2010, Schedule 11 (Appointed Day) Order 2011(S.I. 2011/132)
The Finance Act 2009, Schedule 56 (Appointed Day) and (Consequential Provisions) Order 2010 (S.I. 2010/466)
The Finance (No. 3) Act 2010, Schedules 10 and 11 (Income Tax Self Assessment and Pension Schemes) (Appointed Days) Order 2011 S.I. 2011/703
15 The Finance Act 2009, Schedules 55 and 56 (Income Tax Self Assessment and Pension Schemes) (Appointed Days) and (Consequential and Savings Provisions) Order 2011 (S.I. 2011/702)

20 Case law

- Hardings Bar & Catering Services Ltd* [2013] UKFTT 017 (TC)
W M Hardill Sons & Co [2013] UKFTT 60 (TC).
HMRC v Hok Ltd [2012] UKUT 363 (TCC)

25 Facts

2. The Finance Act 2009 Schedule 56 provides for penalties to be levied when a person fails to submit PAYE payments by the due date.
3. In respect of the year 2011-2012 HMRC consider that the appellant failed to make monthly payments on time on at least eight occasions. On 14 December 2012
30 HMRC sent the appellant a Penalty notice for late payment of PAYE. This charged a penalty of £1,227.91 for the tax year 2011-2012.

Appellant's submissions

4. In a letter dated 20 December 2012 the appellant writes "we have paid as quickly as we possibly can due to the fact we have been awaiting funds from our debtors. In this current climate, customers are taking longer to pay us, and therefore
35 in turn, we are taking longer to pay others."
5. In a letter dated 17 January 2013 to HMRC the appellant states "As far as contacting yourselves with regard to late payment, we would have done this had we thought we would be unable to pay. We may have been slightly overdue with

payments in the past but payment has always been made as soon as we have the funds to do so.”

6. In the Notice of Appeal dated 26 June 2013 the appellant makes the following points:

- 5 a) The reason we are late paying our PAYE is due to the fact that our cash flow is not good.
 b) Most of our customers pay us at the end of the month and not the 20th of each month when tax payments are due.
 c) It’s not that we don’t want to pay on time we are unable to.

10 7. At the appeal Mr Gemmell repeated these arguments. He said the recession was unforeseen and an unusual circumstance which had affected many businesses. He complained that the government had bailed out the banks but the banks will not help small businesses who owe money to HMRC. In fact they had tightened up their
 15 lending by freezing or reducing borrowing limits. He claimed that these circumstances constituted a reasonable excuse.

8. Mr Gemmell also complained that it is very difficult to get through to HMRC on the telephone.

HMRC Submissions

20 9. HMRC state that the appellant had been continually making late payments since the tax year 2007/8. In respect of the period covered by the penalty they submitted the following table:

Tax month	Date payment due	Date payment made	Amount not paid on time	Number of days late	Whether Failure counts toward default penalty
1	22-05-2011	20-05-2011	£0.00	On time	No
2	22-06-2011	29-06-2011	£2,684.68	7	No*
3	22-07-2011	21-07-2011	£0.00	On time	No
4	22-08-2011	25-08-2011	£5,613.59	3	Yes
5	22-09-2011	23-09-2011	£5,072.25	1	Yes
6	22-10-2011	01-11-2011	£5,353.14	10	Yes
7	22-11-2011	No payment made	£0.00		

8	22-12-2011	23-12-2011	£10,211.78	1	Yes
9	22-01-2012	17-04-2012	£4,412.57	86	Yes
10	22-02-2012	17-04-2012	£5,213.33	55	Yes
11	22-03-2012	27-04-2012	£5,053.73	36	Yes
12	22-04-2012	No payment made	£0.00		**

*Paragraph 6(3) Schedule 56 of the Finance Act 2009 determines that the first failure to pay on time for that tax year does not count as a default for that year.

5 ** Following the case of *Agar Ltd v HMRC* [2011] UKFTT 773 (TC), TC 01625 the payment due on 22 April 2012 should not be treated, for the purpose of late payment penalties as a default during the tax year 2012-2013.

Analysis of this table shows that in the 12 periods

- i) Two payments (May and July 2011) are accepted by HMRC as being made on time.
- 10 ii) Following the on time payment made in July 2011 there were at least seven subsequent late payments.
- 15 iii) No payment was made for tax month 7 but it appears that the payment made one day late for tax month 8 was approximately twice the amount of the payments for previous and subsequent months indicating that this payment was probably in respect of two months. HMRC have taken this as one default whereas they could have taken it as two defaults.

10. HMRC submitted that the appellant does not dispute that the payments were not made by the due dates. They also say the appellant has accepted they were unable to pay.

20 11. The appellant has used time to pay arrangements in the past but chose not to use it in 2011-2012.

12. HMRC say that lack of money is not in itself a reasonable excuse for a failure to make payments on time. In order to be a reasonable excuse, the lack of funds must have been due to unforeseeable events outside a person's control and been a direct or indirect cause of the failure.

25 13. HMRC say it is not enough for payment to be made in full, in order to avoid a penalty, payment must be made on time.

14. The appellant has not demonstrated anything unusual or unexpected beyond the problems encountered during the normal course of trade.

15. HMRC issued a penalty warning letter to the appellant on 29 June 2011, 14 December 2011, 23 December 2011, 2 February 2012 and 23 February 2012.
5 They telephoned the appellant on at least four occasions and on two of those occasions spoke to Mr Gemmell and warned him of legal action and penalties.

16. In support of their submissions HMRC refer to the decisions of the First-tier Tribunal in the cases of *Hardings Bar & Catering Services Ltd* [2013] UKFTT 017 (TC) and *W M Hardill Sons & Co Limited* [2013] UKFTT 60 (TC), TC 02480.

10 17. In the latter case Judge Connell says:

“The adverse trading circumstances affecting the appellant were not in dispute. We accept that the appellant’s late payments were almost entirely due to cash flow pressures on its business. However as clearly stated in paragraph 6(2)(a) of Schedule 56, an insufficiency of funds does not qualify as a reasonable excuse. An
15 inability to pay does not represent special circumstances, which might justify a reduction in the penalty. An exceptional or unforeseen event, which caused the insufficiency of funds, may amount to a reasonable excuse but on the facts of this appeal there was no such event. Something specific and related to the particular taxpayer is required. Adverse economic conditions and particularly late payments by
20 customers, which happen on a regular basis, do not suffice.”

Tribunal’s Observations

18. The level of the penalty; and whether it is unfair; are covered in the decision of the Upper Tribunal in the case of *Hok Ltd*. That decision also considers whether the jurisdiction of the First-tier Tribunal includes the ability to discharge a penalty on the
25 grounds of unfairness. At Paragraph 36 of that decision it states “...the statutory provision relevant here, namely TMA s100b, permits the tribunal to set aside a penalty which has not in fact been incurred, or to correct a penalty which has been incurred but has been imposed in an incorrect amount, but it goes no further. ...it is plain that the First-tier Tribunal has no *statutory* power to discharge, or adjust a
30 penalty because of a perception that it is unfair.”

19. The level of the penalties has been laid down by parliament. The only other consideration that falls within the jurisdiction of the First-tier Tribunal is whether or not the appellant has reasonable excuse for his failure as contemplated by The Finance Act 2009 Schedule 56 paragraph 16. The Tribunal explored at length with
35 Mr Gemmell whether there was any reasonable excuse for the appellant’s failures. Mr Gemmell accepted that the appellant had cash flow difficulties. The Tribunal tried to understand from Mr Gemmell what had given rise to those cash flow difficulties and whether there was anything that could be regarded as unforeseen or an unusual circumstance that might be considered to constitute a reasonable excuse for the late
40 payments. Mr Gemmell could not offer any explanation except for the ongoing recession and what he considered was the government’s lack of support for small

businesses during the recession. He continued to make political arguments as to the failures of the government and the need to change the law. It seemed to the Tribunal that the few explanations he was able to give as to the reason for the cash flow problem were not unforeseen or unusual and could fairly be described as the normal hazards of trade. The Tribunal pursued with Mr Gemmell the point that had been made about how long the appellant had to wait for debtors to pay. However Mr Gemmell said that most took 30 days, but some as much as 60 days. However he advised that those who took 60 days were only a small proportion of the total turnover. The Tribunal considers that payment delays of 30 days are not unusual and does not consider that this and the small proportion of delays that were for 60 days constitute a reasonable excuse for the late payments of PAYE.

20. The Tribunal considers that none of the points advanced by the appellant constitute a reasonable excuse for the late PAYE payments. The penalties for late PAYE payments as well as penalties for late tax payments and late tax returns have all been well publicised and the appellant must have been aware of his obligations in this respect. The comments by Judge Connell in the case *W M Hardill Sons & Co Limited* quoted above seem to the Tribunal to accurately describe the position in this appeal also.

21. The respondents have applied the legislation correctly and calculated the amount of the penalties accurately for the period 2011-12. No penalty is levied for the first default. In accordance with The Finance Act 2009 Schedule 56 paragraph 6(6) the following seven to nine defaults give rise to a penalty rate of 3% levied on the tax due on those defaults. The tax due on the defaults totals £40,930.39. Therefore the penalty is 3% of £40,930.39 which is £1,227.91.

22. The Finance Act 2009 Schedule 56 paragraph 16 provides that a penalty for a period may be set aside if the appellant has reasonable excuse for the failure. The appellant has not established a reasonable excuse for any of the late PAYE payments. Therefore the appeal is dismissed.

23. Paragraph 9 of Schedule 56 of the Finance Act 2009 (Special Reduction) provides HMRC with discretion to reduce any penalty if they think it right to do so because of special circumstances. On the information held in this case HMRC did not consider there were any special circumstances which would allow them to reduce the penalty. The Tribunal sees no reason to disagree with that decision.

24. 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.

5

PETER R SHEPPARD
TRIBUNAL PRESIDING MEMBER

10

RELEASE DATE: 6 December 2013