



TC03810

Appeal number: TC/2013/07807

PAYE – late submission of monthly payments for PAYE - returns – whether penalty should be reduced - yes to the extent advised by HMRC prior to the hearing.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

C & DDH LTD

Appellant

- and -

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

Respondents

**TRIBUNAL: PRESIDING MEMBER PETER R SHEPPARD FCIS FCIB CTA AIT
DR HEIDI POON, CA, CTA, PhD**

**Sitting in Public at George House, 126 George Street, Edinburgh on Friday
25 April 2014**

The Appellant was unrepresented

Shari McMullen, Officer of HMRC, for the Respondents

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DECISION

Introduction

5 1. The appellant provides Homecare services in the Edinburgh area and trades under the name Elite Homecarers.

2. This concerns an appeal against a penalty determination issued by HMRC under Section 56 of the Finance Act 2009 for late payment of various monthly amounts due for the tax year 2011-2012.

10 3. HMRC have issued a number of assessments for the penalty in varying amounts as follows:

19 September 2012:	£3,115.27
8 October 2013:	£3,006.14
16 January 2014:	£2,453.57

15 4. The appellant had requested an internal review by HMRC of the assessment for £3,115.27. The result of that review was that the assessment was reduced to £3,006.14. The appellant lodged a notice of appeal against that assessment on 9 November 2013.

20 5. On 7 January 2014 the Tribunal notified the parties of the hearing date of 25 April 2014.

6. As part of their preparation for that hearing HMRC again reviewed the position and as a result on 16 January 2014 further reduced the penalty amount to £2,453.37.

25 7. On 24 April 2014 the appellant telephoned the Tribunal advising that it would not be represented at the hearing, which should go ahead in his absence. They confirmed this by e-mail later in the day. As it was clear that the appellant had been properly notified of the hearing, the hearing proceeded under the terms of Rule 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

Statutory Framework

30 The Income Tax (Pay As You Earn) Regulations 2003 Section 69.

Finance Act 2009 Schedule 56.

The Finance Act 2009, Schedule 56 (Appointed Day and Consequential Provisions) Order 2010 (SI2010/466).

35 The Finance (No.3) Act 2010, Schedule 11 (Appointed Day) Order 2011(SI2011/132).

The Finance Act 2009, Schedules 55 and 56 (Income Tax Self Assessment and Pension Schemes) (Appointed Days and Consequential and Savings Provisions) Order 2011 (SI2011/702).

5 The Finance (No.3) Act 2010, Schedules 10 and 11 (Appointed Days) (Income Tax Self Assessment and Pension Schemes) Order 2011 (S.I.2011/703).

Finance (No.3) Act 2010.

Case law

Agar Ltd v HMRC [2011] UKFTT 773 (TC)

HMRC v Hok Ltd [2012] UKUT 363 (TCC)

10 *Dina Foods Ltd v HMRC* [2011] UKFTT 709 (TC)

HMRC v Total Technology (Engineering) Ltd [2012] UKUT 418 (TCC)

Core Technology Systems (UK) Ltd v HMRC [2012] UKFTT 629 (TC)

J M Legal Ltd v HMRC [2012] UKFTT 594 (TC)

Devaynes v Noble (Clayton's Case) [1816] 1 Mer 572

15 **Preliminary matter**

8. In respect of the assessment for 16 January 2014 for £2,453.37 it was explained that Schedule 56 of the Finance Act 2009 at paragraph 6(6) provides that:

“If P makes 7, 8 or 9 defaults during the tax year, P is liable to a penalty of 3% of the total amount of those defaults”. “P” is defined as “a person”.

20 9. HMRC had used this provision to calculate a penalty of £2,073.53, being 3% of nine defaults totalling £69,117.92 that had arisen in the tax year 2011-12.

10. Apart from the defaults related to late payment as noted above, there was also a sum of £7,330.26 that remained unpaid after six months, and a further penalty of 5% of that sum is due under the terms of paragraph 7 of Schedule 6 of the Finance Act
25 2009. Thus a further penalty of £366.51 was due.

11. In addition £270.62 of Class 1A National Insurance Contributions was outstanding for over 30 days, so a penalty of £13.53 was levied under the terms of paragraph 3(2) of Schedule 56 of the Finance Act 2009.

12. The total of these three amounts is £2,453.50.

30 13. On the morning of the hearing HMRC provided a further revised assessment, which was undated but was for the increased sum of £3,571.52.

14. HMRC had realised that they had miscounted and in fact there had been 10 defaults, which totalled £72,150.60. In those circumstances Schedule 56 at paragraph 6(7) provides:

5 “If P makes 10 or more defaults during the tax year, P is liable to a penalty of 4% of the total amount of those defaults”.

15. Using this provision HMRC had revised the penalty assessment from £2,073.53 to £2,886.02, being 4% of £72,150.60.

10 16. In this assessment HMRC state that £7,986.59 of the tax was outstanding for over six months, and for the reasons explained at paragraph 10 above a further penalty of 5% of that amount is due, namely £399.32.

17. As £5,453.10 was still unpaid after 12 months a further penalty of 5% of that amount is due under the terms of paragraph 8 of Schedule 6 of the Finance Act 2009 ie £272.65.

15 18. In addition £270.62 of Class 1A NIC was outstanding for over 30 days and a penalty of £13.53 was levied under the terms of paragraph 3(2) of Schedule 56 of the Finance Act 2009.

19. The total of these penalties (ie: £2,886.02, £399.32, £272.65 and £13.53) is £3,571.52.

20 20. Both members of the Tribunal had taken the opportunity to read the papers before the hearing and both independently had found the calculations to support the assessments difficult to follow.

21. At the hearing the Tribunal advised HMRC of their difficulty and were advised that there were at least seven separate calculations within HMRC. Not all of these had been presented to the Tribunal.

25 22. The Tribunal advised that it was not prepared to accept the undated revised assessment for £3,571.52. It had been handed in immediately prior to the hearing. There was no explanation of why different amounts were considered to remain outstanding for 6 months. It was for significantly more than the previous assessment and the appellant had not been provided with a copy and therefore had been given no
30 opportunity to respond to it.

23. HMRC said that in view of the confusion and in the interests of fairness they had decided to only pursue the reduced amount of £2,453.57.

The appellant’s submissions

35 24. On 10 June 2013 Mr D Hay, a Director of the appellant, wrote to HMRC Debt Management. He wrote

“I am making a complaint about the penalty you have applied, appealing against the penalty, and applying for full postponement.

We were in constant contact with you relating to an oversight in payment for the year to 5th April 2012. We had no indication of a penalty in those conversations.

- 5 We are unable to pay any penalty as we struggled to pay back the outstanding taxes. We have no assets and are in permanent overdraft as we are not making enough money to recover.”

25. Mr Hay wrote to HMRC on 22 September 2013. That letter included the following paragraphs

- 10 “It was explained in conversations with yourselves that the error of underpayment appears to have occurred due to an error on the part of our payroll bureau. Your penalties of £3,115.27 for an amount outstanding of £12,822.78 work out at 24% which, in my view, is not what the legislation is designed for and therefore I deem to be excessive, especially for a small business struggling to pay. I do not believe the
15 legislative authorities will disagree with that view.

There are concerns with this case overall – the inability to record payments received versus end of year data received, the telephone calls to yourselves which have not been correctly logged or noted, the suggested telephone calls to ourselves where there is no evidence at your end or ours of calls having been made, mail which cannot
20 easily be accessed...

I do not believe, given the way this case has been conducted, penalties of 24% are appropriate and we will be progressing this further if necessary on that basis.”

26. In the Notice of Appeal dated 9 November 2013 the appellant makes the following short statement “The penalty is incorrect. The circumstances have not been
25 fully considered. The company was under the impression that an agreement with HMRC had been reached and acted on that basis.”

HMRC’s submissions

27. Ms McMullen took the Tribunal through each of the monthly amounts due by the appellant and the payments received by HMRC. The amounts were due to be paid by
30 the 22nd of each month. Ten of the payments had been made late.

28. HMRC agreed that the appellant had been in contact with HMRC but this was not until after the end of the year and therefore too late for time to pay arrangements to be put in place, and therefore had no bearing on the calculation of the penalty.

- 35 29. HMRC also pointed out that the appellant did not dispute that payments were made late.

30. In their Skeleton Argument HMRC drew attention in particular to the First-tier Tribunal decisions in *Core Technology Systems Ltd*; *J M Legal Ltd*; and *Dina Foods Ltd*.

5 31. HMRC referred to paragraph 9 of Schedule 56 Finance Act 2009, which provides HMRC with discretion to reduce a penalty if they think fit to do so because of special circumstances. However, with regard to this case HMRC do not consider there are any special circumstances.

Allocation of payments

10 32. In respect of the payments made in most cases the appellant had specified to which period each payment that was made was to be allocated. There were two payments for which the specification of allocation was unclear. These were a payment on 9 November 2011 for £5,512.44, which was marked “1st to 20th November” and a payment on 29 November 2011 also for £5,512.44, marked “20th to 30th November”.

15 33. At 9 November 2011 there were amounts outstanding for previous months so HMRC decided to apply the payment so that the earliest debts were repaid first.

34. At 29 November 2011 there were still amounts outstanding for the previous month but HMRC decided to apply the amount to the payment due on 22 November 2011.

20 35. It was unclear whether the 29 November payment was intended to meet the debts outstanding at 20 November 2011 or the amount due on 22 November 2011.

36. The Tribunal notes that the amount of the payment due on 22 December 2011 was precisely £5,512.44. Unfortunately the appellant had decided not to attend the hearing so was not available to explain the position.

25 37. The Tribunal consider that the rule in *Devaynes v Noble* (Clayton’s Case) should be followed. The Tribunal considers this to mean that unless there is a clear specification otherwise an amount received should be applied to reduce the earliest debt. In respect of the payment received on 9 November 2011 HMRC had applied the amount to the earliest debt first. In respect of the payment received on 30 29 November 2011 HMRC had not acted consistently in that they had not applied the amount to the earliest debt.

38. In the absence of the appellant it was not possible to ascertain to which debts the payments were intended to be applied. Therefore the Tribunal consider that the payments should both be applied according to the rule in Clayton’s case; that is, to the earliest outstanding debt or debts.

Directions

39. The Tribunal was concerned that the papers introduced at the hearing showing how HMRC had allocated the payments had not been provided to the appellant and thus the appellant had been given no opportunity to comment. This was accepted by

HMRC at the hearing. In view of this and in the interests of being fair to the appellant on 28 April 2014 the Tribunal issued the following directions:

- 5 i. HMRC shall apply the payment of £5,512.44 received on 29 November 2011 firstly to extinguish the outstanding debt from the previous month, and secondly in part payment of the amount due on 22 November 2011;
- ii. By noon on 31 May 2014, HMRC shall provide the appellant with a schedule (copy to the Tribunal) showing the amounts due each month, the payments made, and how the payments have been allocated to the monthly amounts due;
- 10 iii. By noon on 30 June 2014 the appellant shall confirm whether it wishes to continue with the appeal.
- iv. In the event that the appellant wishes to continue with the appeal, a date for resumption of the hearing shall be arranged.

40. HMRC complied with the first two directions and in a letter dated 20 May 2014 to the appellant, enclosing details of how, having revised the allocation of the payments, they had recalculated penalty to a figure of £3,598.52. However in accordance with the discussions at the Tribunal hearing, they confirmed that they would only pursue the amount of £2,453.57 notified in the 16 January 2014 assessment.

41. As the appellant had not complied with the third direction by noon on 20 30 June 2014 the Tribunal telephoned the appellant who confirmed that they did not want a resumption of the hearing and requested a decision be issued.

The Tribunal's observations

42. The level of the surcharges and whether or not they are disproportionate is discussed at length in the Upper Tribunal's decision in the case of *Total Technology Engineering Ltd*. The decision also discusses the fact that there is no power of mitigation available to the Tribunal. The only power in this respect is that if the Tribunal considers the amount of the penalty is wholly disproportionate to the gravity of the offence, if it is not merely harsh, but plainly unfair, then the penalty can be discharged. For example in *Energys Holdings Ltd* the Tribunal discharged a potential penalty of £130,000 for the submission and payment of a return submitted one day late.

43. The appellant suggests that the original penalty of £3,115.27 was levied as a percentage for an amount of tax outstanding of £12,822.78. In fact, £2,681.92 of the penalty was levied for 10 late payments of PAYE totalling £67,048.09. It also included an additional amount of £419.83 because payments of £8,396.52 were outstanding for over six months.

44. The level of the penalties has been laid down by Parliament and unless the default surcharge has not been issued in accordance with legislation or has been calculated inaccurately the Tribunal has no power to discharge or adjust it other than for the

reasons as outlined in paragraph 42 above. The Tribunal does not consider that a penalty of £2,453.37, which is the culmination of a series of failures to submit monthly payments of PAYE on time during a period of 12 months, as wholly disproportionate to the gravity of the offence nor plainly unfair.

5 45. The only other consideration that falls within the jurisdiction of the First-tier Tribunal is whether or not the appellant has reasonable excuse for its failure as contemplated by Paragraph 16 of Schedule 56 of the Finance Act 2009.

46. In general, insufficiency of funds is not considered to constitute a reasonable excuse for late payments. The discussions with HMRC referred to by the appellant
10 happened after the end of the tax year, and were therefore too late to prevent a penalty being issued or to establish a reasonable excuse for the late payments at the time.

47. In the light of the Upper Tribunal decision in *Total Technology (Engineering) Ltd*, as explained in paragraph 42 above, this Tribunal has no statutory power to adjust the level of a penalty paid unless it is incorrectly levied or inaccurately calculated.

15 48. In the Tribunal's opinion, the 29 November 2011 payment was applied by HMRC to the wrong amount outstanding with the result that the penalty was inaccurately calculated, and it therefore issued directions in order for that payment to be correctly applied and the penalty re-calculated. In accordance with those directions HMRC has re-calculated the penalty as £3,598.52 but for the reasons outlined above
20 has decided to only pursue the lower amount of £2,453.57. The Tribunal sees no reason to interfere with that decision.

49. The appellant has not established a reasonable excuse for any of the late payments of the monthly PAYE amounts for the year ended 5 April 2012. HMRC is not aware of any special circumstances that could apply to this case and neither is the
25 Tribunal. Therefore the appeal against the penalty of £3,006.14 is allowed but only to the extent of the reduction to the amount of £2,453.37 as notified by HMRC to the appellant on 16 January 2014 and confirmed in their letter to the appellant dated 20 May 2014.

50. 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
30 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)"
35 which accompanies and forms part of this decision notice.

PETER R SHEPPARD
TRIBUNAL PRESIDING MEMBER

40 **RELEASE DATE: 17 July 2014**