



**TC04000**

**Appeal number: TC/2013/03787**

*Penalty imposed for PAYE paid late – time to pay arrangement not in place for relevant year (2011/2012) – no reasonable excuse – allocation of payments received - could these have been allocated differently - no allocation suggested by Appellant – decision affirmed - appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**AYNGARAN INTERNATIONAL (UK) LTD**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE JUDITH POWELL  
MRS LYNNETH SALISBURY**

**Sitting in public at Bedford Square, London on December 5 2013 and adjourned in order for the parties to provide further information and make further representations**

**Mr Karagasingan Kularatnam, Finance Manager, for the Appellant**

**Ms Karen Weare, Presenting Officer for HMRC, assisted by Mr Neil Nagle, for the Respondents**

## DECISION

### *Late appeal*

- 5 1. The Appellant made an unopposed application to appeal out of time (by a matter of six days) which was granted.

### *Appeal*

2. This appeal is against a penalty determination in the amount of £3478.84 for 2011/2012 which was imposed because of late payment of PAYE. The determination  
10 was issued on 25 January 2013 and the review upholding this decision was concluded on 24 April 2013. There is very little dispute about the background facts to this case. An initial question concerned whether the Appellant had agreed time to pay arrangements but it soon became apparent that the main area of dispute concerned the way in which payments made by the Appellant were allocated by the Respondents  
15 towards payments of its PAYE liabilities.

3. The Respondents say the amounts due in 2011/2012 have now been paid in full but that they were not paid by the date specified. The penalty which is the subject of the appeal relates to an amount payable under the PAYE regulations. The date specified for payment of PAYE is the 19<sup>th</sup> of the month in each case (22<sup>nd</sup> in the case  
20 of electronic payments).

4. Where payment is not made by the due date a penalty will be imposed although this is subject to the availability of various reliefs.

5. The powers of this Tribunal are set out in paragraph 15 of Schedule 56 Finance Act 2009. They are not merely supervisory. The rules allow the tribunal to affirm the  
25 Respondent's decision, cancel that decision or substitute for it another decision the Respondents had power to make.

### *Calculation of penalty and possibility of relief being available*

6. The penalty is calculated according to the principles set out in Schedule 56 Finance Act 2009. Paragraph 1(1) provides for a penalty where the tax is unpaid on  
30 the due date and paragraph 5 and 6 read together explain how the penalty is calculated; this depends on the amount of tax paid late and the number of defaults in the tax year. The first default does not count. Where there are 1-3 defaults the rate is 1% of the tax paid late, where there are 4-6 defaults the rate is 2%, where there are 7-9 defaults the rate is 3% and where there are more than 10 the rate rises to 5%. A 5%  
35 penalty is imposed by paragraph 7 on the tax which is unpaid after six months and a 5% penalty is imposed by paragraph 8 on the tax unpaid after 12 months.

7. Paragraph 16 prevents a penalty falling due where the Appellant can show a reasonable excuse for its failure to pay. There is no definition of reasonable excuse in the legislation although certain possible excuses are specifically excluded from the  
40 scope of this relief.
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8. Paragraph 10 deals with a different relief which is that a person will not be liable to a penalty if he can show he has requested a deferral of the payment and HMRC agrees to the deferral. This will only operate to relieve the person from liability to a penalty if he requests time to pay before the amount falls due and then complies with the terms of the agreement.

9. Paragraph 9 provides that “if HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule”. Paragraph 9(2) specifies that ability to pay or lack of ability to pay cannot be a special circumstance.

10. The penalty charged on the unpaid duties in this case is based on 3% for eight defaults unpaid at the due date, 5% for four defaults unpaid at six months after the due date and 5% for one month unpaid at 12 months unpaid at 12 months after the due date. This is because the Respondents contend that the Appellant failed to make nine payments of PAYE on time in the tax year, failed to pay 4 payments by six months after the due date and failed to pay one payment twelve months after the due date.

11. They say that in none of these cases did the Appellant show it had a reasonable excuse for its failure. One of the excuses not available in this context is that the Appellant had insufficient funds unless attributable to events outside the Appellant’s control.

12. The Respondents accept that no evidence can be provided to support their suggestion that they considered whether to give a special reduction at the same time as reasonable excuse and/or at the review stage but that its decision (if any) on special reduction does not make its decision unreasonable since it not take into account irrelevant considerations and did not fail to take into account relevant ones. They say that if the Tribunal considers that the decision is flawed, or that no decision on this was made, there are no special circumstances which would justify a special reduction.

#### *Facts*

13. Mr Kularatnam represented the Appellant which is the employer. At the relevant times he was the Finance Manager and was first employed by the Appellant in October 2010. He was never a director of the Appellant company. At the relevant times the wages clerk was Mr Ravi Suadaran who prepared the pay roll. Mr Kularatnam monitored the payments and the amounts paid each time was decided upon by him in consultation with a director. During the relevant periods Mr Manickavasagar was a director of the Appellant company. Each of these three individuals had conversations with HMRC relating to PAYE between May 2010 and April 2012.

14. There was a time to pay arrangement in place for 2010/2011. This seems to have involved payments of £10,000 a month although we were not told about (and at the hearing neither party seemed to know) the exact terms of the arrangement. A record of conversations between HMRC and Mr Manickavasagar and HMRC and Mr Kularatnam in June 2010, September 2010, February 2011 and April 2011 show that

the payments due were not made on time and HMRC pressed for payment on several occasions. The record shows that payments due for 2010/2011 were not made by the end of that year. The record also shows a number of telephone calls made by HMRC to an unnamed person at the Appellant company during the year in question  
5 (2011/2012) including a call on 23 May concerning payments which were then overdue and warnings made about penalties. It is likely, but not entirely clear, that the 23 May call related to 2010/2011 tax payments. Various subsequent attempts were made by HMRC to make telephone contact with someone at the Appellant company who had knowledge of its tax payments. These subsequent calls might  
10 have been directed at outstanding payments for 2010/2011 (since payments for that year were outstanding throughout 2011/2012) and/or for 2011/2012 but no meaningful contact was made with the Appellant company and so nothing turns on this other than to show that the Appellant's tax payments were overdue. On at least one occasion the person at the Appellant company who had answered the phone  
15 promised to ask Mr Manickavasagar (a director) to make contact but no one called back until Mr Suadaran made contact in August 2011 when he also promised to talk to a director and call back after he had that conversation. Distraint calls to the company were made by HMRC on 10 January 2012, 27 January 2012 and 19 March 2012. Finally, on 26 April 2012 Mr Kularatnam phoned to advise that a payment of  
20 £15,000 would be made on 27 April and that it was late due to "cash flow". It seems to have been assumed by the Respondents that this payment was intended for 2011/2012 rather than for 2010/2011.

15. A payment schedule was produced showing payments that were made by the Appellant between 8 June 2010 and 27 September 2013. Payments made between 8  
25 June 2010 and 20 April 2011 were allocated by HMRC either to 2009/2010 or to 2010/2011. There was no payment made after 20 April 2011 until 24 June 2011.

16. The Appellant made ten payments between 24 June 2011 and 26 May 2012. Of these, seven were allocated to 2011/2012, one to 2009/2010 (the final one for that  
30 year) and the other two (£10,000 made on 22 November and £15,000 on 8 December) to 2010/2011. The allocations were not made chronologically; the first four payments in that period were allocated to 2011/2012, the next one to 2009/2010, the following two to 2010/2011 and the final three for that period were allocated to 2011/2012.

17. On 28 June 2012 the Appellant made a payment which was allocated by the Respondents to 2012/2013. At that time amounts were still outstanding for  
35 2010/2011 and 2011/2012. We received no explanation why the payment was allocated in this way but the allocation was not challenged by the Appellant.

18. During the period 20 August 2012 and 30 March 2013 the Appellant company made ten further payments. The first four payments were allocated to 2010/2011 and  
40 2011/2012, the fifth payment was allocated to 2012/2013 and the final five payments to 2011/2012. The two payments allocated to 2010/2011 were those made on 20 August 2012 (£19801.78) and 30 October 2012 (£2808.21). These were the final payments allocated to 2010/2011. Payments each of £10,000 were allocated to 2011/2012 on 8 October 2012, 27 November 2012, 28 December 2012, 27 January 2013, 26 February 2013 and 30 March 2013. We conclude that these payments were

made in pursuance of the arrangement made between the Appellant and HMRC which it was agreed they had reached in October 2012. It is relevant that this agreement was reached after the end of 2011/2012 because it will not give the Appellant any relief from penalties for late payment for the reasons explained below.

5 19. In the period 23 July 2013 to September 2013 there is a record of six payments  
being made. The first five were allocated to 2013/2014 and the sixth, final payment  
in that period, was allocated to 2011/2012. This final payment in the period was for  
£7,000. We received no explanation why this payment was allocated to 2011/2012  
10 after earlier payments were allocated to the later years but, again, this was not  
challenged by the Appellant and the allocation may have been the result of its own  
request.

20. At the time of the hearing Ms Weare was unable to say for certain whether the  
payments made in 2011/2012 were accompanied by payment slips and in particular  
with any request for their allocation to particular periods.

15 *Submissions*

21. The Appellant contended there was a time to pay arrangement in place during  
2011/2012 although he did concede it was not put into place formally until after the  
end of the year. Mr Kularatnam believed that the Appellant continued, on an informal  
basis, with whatever arrangement had been made for the previous year although he  
20 was not clear what the arrangement was for that year. Mr Kularatnam says that the  
reason for the failure to pay was because of the erratic cash flow position of the  
business. He queried the way in which payments made by the Appellant in  
2011/2012 were allocated to the PAYE which was due for that year and says that if  
25 the allocation was different the penalty would be less. In particular he queried why  
the payment of £10,000 received by the Respondents on 7 September 2011 was  
allocated to month 5 rather than to month 4 and why the two payments of £35,000 in  
total made in late November and early December 2011 were allocated to 2010/2011  
rather than to 2011/2012. Mr Kularatnam said that the amount of the payments made  
30 by the Appellant from time to time was always decided upon by the director of the  
Appellant company in consultation with him, that records were kept on a manual  
system and the papers were not readily available to him although he said he would be  
able to find out the PAYE amounts for each month which were entered on a ledger if  
he was given the opportunity to do so.

22. The Respondents agreed that the allocation of payments was not done  
35 chronologically although Ms Weare said that this is usually the case unless a different  
allocation is requested at the time the payment is made. She believed that there was  
no request for allocation and the Respondents still did not know what the monthly  
amount was; they would still, even at this late stage, calculate the penalty on a  
different basis if they were made aware of the correct monthly figures and could see  
40 that this affected the allocations they had made. The Respondents have the final  
figures due for the company and for each employee but still had no idea of the  
amounts due for each month individually.

23. At the hearing we decided that there was no evidence that the Appellants had a time to pay arrangement for the year in question which had been agreed before the payments were due to be made. Accordingly the Appellants were exposed to the possibility of a penalty because the payments were made after the due date.

5 24. In view of the submissions that were made we agreed to adjourn the hearing so that the Respondents could advise us and the Appellant whether any of the payments made by it had been accompanied by payslips allocating payments to 2011/2012 (or to any other year). The Respondents would also explain how they calculated the amounts not paid on time for months 1 – 11 of 2011/2012.

10 25. The Appellants were invited to submit Forms P32 to the Respondents showing the amounts due each month and how the payments made on 24 June 2011, 19 July 2011, 7 September 2011, 29 October 2011 (but only as to £1567.92 of that payment) 28 January 2012, 22 March 2012, 26 May 2012, 8 October 2012, 27 October 2012, 27 November 2012, 28 December 2012, 27 January 2013, 26 February 2013, 30 March 15 2013 and 27 September 2013 should be allocated assuming they were not accompanied by a payslip.

*Information received after the hearing and the Respondents further submissions*

20 26. After the hearing was adjourned we were informed by Ms Weare on behalf of the Respondents that none of the payment cheques was accompanied by a payslip and the only indication that HMRC had about allocation was a request from the Appellant (apparently made via another HMRC department) that a payment made on 25 October 2011 should first be allocated to clear amounts due for 2009/2010. When this was done the balance of the £10,000 which remained (£1568.12) was allocated at the 25 request of the Appellant to month 6 of 2011/12.

30 27. The Respondents provided information about the method they used to allocate payments received to specific years and months. This explanation was intended to allow the Appellants the opportunity to provide forms P32 and explain how they suggested the payments made in 2011/2012 should have been allocated. The Appellant did not take the opportunity to provide Forms P32 showing the amounts due for the relevant months nor did they explain how they thought the payments made in 2011/2012 should have been allocated.

35 28. Once it was clear the Appellants were not going to provide Forms P32 nor request a different method of allocation of payments made in 2011/2012, Ms Weare explained how payments that are not allocated by the taxpayer are dealt with by HMRC upon receipt. First, it is necessary to understand how HMRC deals with a case where no payments are made for a period.

40 29. If the employer does not submit an allocated payment, HMRC can assume that no payment is due for the month although, in the absence of a monthly payment, HMRC can, instead, specify amounts under Regulation 78 Income Tax (Pay as you Earn) Regulations 2003. Amounts can be specified where the employer has not paid tax

due according to Regulation 68 within 14 days after the end of the tax period (a tax month, being a period beginning on the 6th day of a calendar month and ending on the 5th day of the following calendar month). If, after 17 days, the employer has not paid tax due under regulation 68, and HMRC believe the employer is liable to pay an amount of tax, Regulation 78(4) allows HMRC to consider the employer's past payment record and to specify, to the best of their judgement, the amount of tax they consider the employer is liable to pay. Regulation 78(6) allows the employer to claim that any payment is the full amount and can require HMRC to inspect the PAYE records.

10 30. HMRC has issued guidance about the method its officers should adopt in practice. For the months in 2011/2012 in order we were told that the following occurred –

15 Month 1 (May) - no payment received. HMRC specified £10,011.07. No payment allocated. The specified payment was based on a one twelfth of the total amount due for the previous year. No penalty.

Month 2 (June) – cheque £10,330.68 received 24 June 2011 assumed to be a late payment for month 2. Penalty charged.

Month 3 (July) – cheque received £7,500 on July due date without allocation and so assumed to be on time for month 3 and no penalty charged

20 Month 4 (August) – no payment. HMRC specified £5,943.56 and a penalty was charged on specified amount. The specified amount was based on the average of payments received in the year applied to the number of months already elapsed in the current year. Total payments of £17,830.68 had been received in the year and when this figure is divided by 3 the resulting total is £5943.33. There is a small pence difference which was acknowledged. We did not examine the reason for this slight discrepancy.

Month 5 (September) – £10,000 payment received on 7 September before the due date but assumed on time or early for month 5 – no penalty. There was no explanation why the amount was not assumed to be a late payment for Month 4.

30 Month 6 (October) – HMRC specified amount £5,566.74. This specified total was based on the same principles explained in relation to Month 4 but using revised figures of £27,830.68 received to be divided by 5 giving the resulting figure of £5566.14. The Appellant had specified that the £10,000 paid on 29 October 2011 should first be used to clear the 2009/2010 balance still outstanding and when this was done the remainder of the payment (£1568.12) was allocated to Month 6 (apparently also at the Appellant's request) and a penalty was imposed on this amount rather than the specified amount.

40 Months 7,8 and 9 (November, December and January) – HMRC said no payment was received. They did not explain why the payments made on 22 November and 8 December (total £35,000) were allocated to 2010/2011 rather than to 2011/2012. For each month HMRC specified £4899.80 and imposed a penalty on the specified

amounts. The amount specified was based on payments received of £29,398.80 and divided by 6. When a payment of £4,900 was received on 28 January 2012 HMRC allocated this to month 9 as a late payment, revised the amount for that month and based the penalty on the revised amount.

- 5    Month 10 (February) – No payment was received and HMRC specified £3810.98 and imposed a penalty on the specified amount. The specified amount was based on total payments received of £34,298.80 which was divided by 9.

Month 11 (March) – a cheque of £10,000 was received on 22 March 2012 shortly after the due date for Month 11. This was allocated to Month 11.

- 10    29. At the end of the year the total due according to the employer's end of year return was £126,187.79. The payments made in the year and allocated by HMRC to 2011/2012 were £44,298.60. Other payments made in the year but allocated to earlier years amounted to £40,932.08. These other amounts are made up of the amount of  
15    £8432.08 allocated at the Appellant's request to 2009/2010 and the payments of £35,000 which were made in the year but allocated to 2010/2011. HMRC mentioned Month 12 where a payment of £15,000 was promised on 27 April but was not paid. Month 12 is not relevant to the penalty position for 2011/2012 for this appeal but is, the Respondents argued, relevant to the tax due for the year. We have already said it is not clear to what year the promised payment related; the note of the call was  
20    unclear about this and amounts were outstanding for 2010/2011 at the time that call was made.

29. The Respondents made the following submissions based on the additional information they had provided after the hearing. They acknowledged that there were a number of permutations that could be used to calculate and allocate payments. They  
25    pointed out that they still did not know the correct PAYE figures for each month but that, based on the end of year return, it is well arguable that the correct figure for each month was £10,000 and if that figure was used as a basis for calculation then even if all the payments made in the year had been applied to this average, they submitted that the penalty would be greater than the one charged even before the calculation of  
30    the unpaid amounts at 6 and 12 months was considered. They asked the Tribunal to agree that the Appellant had no reasonable excuse, there was no time to pay in place and to affirm the penalty.

#### *Our decision*

30. First, we confirm what we said at the hearing. We conclude there was no time to pay arrangement in place at any time in the year 2011/2012 in respect of that year.  
35    This exposes the Appellant to the possibility of penalties. We have decided that we can reach a decision on this appeal without a further hearing. We have reached this decision given the absence of any further information from the Appellant, the fact that there have been no submissions from them about how the 2011/2012 payments might  
40    have been allocated differently and their failure to prepare Forms P32 to show what payments were due for each month.

31. We do not find that the Appellant has a reasonable excuse for its failure to pay on time. At no time has the Appellant developed the excuse that it had cash flow issues and there is no evidence that there were circumstances giving rise to these issues that could amount to a reasonable excuse.

5 32. We consider it is unlikely, based on what we heard from the Respondents, that the issue of special circumstances was considered. The Respondents say that much of what was done was based on HMRC guidance. However, we do not find that they failed to take relevant facts into account or gave weight to irrelevant facts. We have not found any facts that might have raised the issue of special circumstances. It is  
10 unfortunate that the decision did not deal specifically with this but it is unsurprising that it did not do so.

33. It is very disappointing that the Appellants did not take advantage of the opportunity they were offered to complete Forms P32 and suggest a different allocation of payments to that chosen by HMRC. We are also disappointed that the  
15 Respondents failed to explain, as they were asked to do, why they allocated the payment received on 7 September 2011 to Month 5 rather than to Month 4 nor why they allocated the £35,000 payments received in two instalments in November and early December 2011 to 2010/2011 rather than to 2011/2012. However, it was open to the Appellant, either at the time or subsequently, to query why this had been done  
20 and it was plain that the Appellant still owed sums for 2010/2011 in November and December 2011 and so the allocation to that year was not unreasonable and on the surface seems to have corresponded with a time to pay arrangement for 2010/12; the amounts paid were round sums compatible with the suggestion that the arrangements made for 2010/2011 were for payments of £10,000 a month. Obviously one of the  
25 payments was for £15,000 but by this stage the Appellants were long overdue with amounts due for 2010/2011 and maybe the more relevant question is why the other payments of £10,000 were not also allocated to 2010/2011. It is perhaps more startling that HMRC should have assumed that this Appellant had made an early payment in September 2011 for the period ending 5 September 2011 rather than a late  
30 payment for the previous period but in the absence of any payslips and/or requests for allocation we do not propose to disturb what was done.

34. We have considered what the Respondents did and have concluded that they might have done things differently but on the basis of the facts they had and the payments they received we do not propose to disturb their conclusion and we do not  
35 propose to substitute a different conclusion. Accordingly we affirm their decision. We dismiss the appeal.

35. 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  
40 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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**JUDITH POWELL  
TRIBUNAL JUDGE**

**RELEASE DATE: 10 September 2014**