



TC02354

Appeal number: TC/2012/06553

TYPE OF TAX – appeal against the penalty imposed for the late payment of PAYE- Schedule 56 Finance Act 2009- whether lack of specific warning was a reasonable excuse – no- whether penalty unreasonable – no-appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

WARWICK DURHAM & CO

Appellant

- and -

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

**TRIBUNAL: JUDGE SANDY RADFORD
MRS ELIZABETH BRIDGE**

Sitting in public at Bedford Square, London on 17 September 2012

The Appellant did not appear but wrote to the Tribunal confirming that it had no objection to the hearing proceeding in its absence

Mrs E. Gardiner, Officer of HMRC, for the Respondents

DECISION

1. This is an appeal against the penalty notice of £3,198.23 for the late payment of
5 PAYE on 10 of the months for the tax year 2010/11.

The legislation

2. 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
10 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.

3. 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 sub-
15 paragraphs (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.

20 (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.

25 In this and other paragraphs of Schedule 56 “P” means a person liable to make
payments.

4. 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 –

- 30 (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—
- 35 (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. 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:

(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-

10 (a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had the power to make.

(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 9-

15 (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.

6. Paragraph 9 (referred to in paragraph 15) states:

20 (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.

25 (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.

7. 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

8. The appellant is a firm of chartered accountants.

9. The appellant accepted that it had paid late each month.

Appellant's submissions

5 10. The appellant submitted that as no reminders or notification of the initial
penalty was sent by HMRC, the appellant had been denied the ability to accelerate the
slightly late monthly payments of PAYE. The appellant submitted that had the
appropriate penalty reminder been sent out, then the payments would have been
10 accelerated from the end of the month when it was usual for the appellants to pay their
suppliers to an earlier date.

11. The appellant submitted that this matter was established recently in the case of
Hok Ltd [2011] UKFTT 433 (TC) where the Tribunal found that HMRC's practice of
sending out late penalty notice was failing to remind tax payers of lesser earlier
penalties was unfair and denied the taxpayers the ability to limit the extortionate
15 penalty position.

12. The appellant submitted that the payments were posted on six of the nine
months on the due date of the 19th of the month and any delay was as a result of the
postal service.

13. The appellant submitted that the penalties raised were extremely unreasonable
20 and disproportionate.

HMRC's submissions

14. Mrs Gardiner submitted that none of the appellant's submissions constituted a
reasonable excuse for the late payments.

15. She submitted that the payments were required to be received by the 19th of the
25 month unless paid electronically and so posting them on the due date merely ensured
that the payments would be late.

16. Mr Gardiner submitted that the PAYE due dates were shown in HMRC's
Employers' Pack and paying booklets. She submitted that HMRC's website provided
full information on penalties, methods of payment and informed employers of the
30 dates by which they needed to initiate payment in order to avoid penalties.

17. Mrs Gardiner submitted that HMRC had followed the legislation to the letter.
The obligation was to make payment of the PAYE and the lack of a warning or an
early assessment of the penalty was not an excuse for failing to make payment.

18. She submitted that the penalty was appropriate because the appellant failed to
35 make payments on time as the legislation required it to do. Paragraph 11 of Schedule
56 put a duty on HMRC to charge a penalty for the failures to pay on time.

19. She submitted that although the appellant had claimed that the penalty was unjustified penalties were only charged in the cases of the most serious or habitual defaulters. A manual process was used to identify these cases and by undertaking this manual intervention she submitted that HMRC had exercised discretion in the penalty charging process and so despite the appellant's claims the penalty was completely appropriate and justified.

20. Mrs Gardiner submitted that whilst the penalty might appear disproportionate it was designed to be somewhat penal in nature in order to encourage payment on time. She submitted that in any event this type of penalty was fair and proportionate because it was progressive. There is no penalty for the first default but as the defaults increase the penalty rate increases.

Findings

21. The Tribunal found that the appellant had no reasonable excuse for the late payment of the PAYE.

22. We found that HMRC was under no obligation to send a warning notice but had done so in May 2010. In the case of *Rodney Warren & Co* [2012] UKFTT 57 (TC) Judge Hellier stated

“Thus the statute, whilst imposing an obligation on HMRC to assess and notify the assessment imposes no wider duty on HMRC than to notify P that its default will lead to a penalty.”

23. We noted that the Upper Tribunal had recently found for HMRC in the case of *Hok* to which the appellant referred in his submissions. In making their decision the Upper Tribunal found that the First Tier Tribunal's finding, that HMRC's failure to send a prompt warning was unfair, was unsustainable.

24. We found that the penalty was proportionate as it increased progressively with each late month.

25. We found that the appellant had admittedly posted the PAYE late each month waiting until the due date to post it.

26. We found that the penalty regime had been well publicised and as a firm of chartered accountants the appellant should have been aware of it.

27. For all the above reasons we found that the penalty was correctly imposed.

Decision

28. The appeal is dismissed and the penalty is hereby confirmed

29. 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.

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**SANDY RADFORD
TRIBUNAL JUDGE**

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RELEASE DATE: 5 November 2012