TC02271

Appeal number: TC/2011/09671

TYPE OF TAX – PAYE –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- appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

J M LEGAL LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE SANDY RADFORD
RICHARD THOMAS

Sitting in public at Bedford Square London WC1B 3DN on 19 July 2012

Mr S. Moore for the Appellant

Ms K. Evans for the Respondents

DECISION

1. This is an appeal against a penalty of £11,018.85 imposed on the appellant for the late payment of PAYE for each month of the tax year 2010/11.

2. Mr Moorhouse, a director of the appellant company, gave evidence for the appellant.

The Legislation

3. 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 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.

4. 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-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.
>
> (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.

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

5. 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 –
>
> (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—

(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.

6. 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-

(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-

(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.

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

(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.

(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.

8. 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

9. On 21 July 2011, HMRC having identified from payment records that the appellant had paid late multiple times during the tax year, issued a penalty notice (including a calculation of the penalty) in the sum of £11,108.85 for the tax year 2010/11. This was based on 12 defaults (the first of which was ignored in computing the penalty). This notice was an assessment to the penalty under paragraph 11 of Schedule 56.

10. The appellant responded on 2 August 2011 claiming ignorance of the new penalty regime and asking for a 75% reduction. HMRC replied on 5 August that the "appeal" was invalid as it contained none of what HMRC say are the three valid grounds for making an appeal.

11. On 1 September 2011 the appellant asked for its appeal to be progressed and claimed that the penalty was unfair and amounted to, effectively, an interest rate of 30%. HMRC it seems must have accepted that there was a valid appeal because it took this letter as a request for an internal review and replied on 20 September requesting any further information which the appellant wished to be considered.

12. On 9 October 2011 the review concluded that the penalty decision should be upheld.

13. On 11 November 2011 the appellant appealed to the Tribunal.

Evidence of Mr Moorhouse

14. Mr Moorhouse, a director of the appellant, stated that although he had three phone calls in the tax year from HMRC and had been warned that penalties might be payable, in previous years he had had such calls without penalties being charged and did not realise that there had been a change.

15. He did not agree that there had been sufficient publicity given to the change if contrasted with the publicity for the self assessment regime.

16. He stated that although he believed that the appellant may have received the warning letter dated 28 May 2010 which was included in the bundle of documents produced to the Tribunal, he did not know whether he had seen it and it did not refer specifically to the potential penalties.

17. He could not remember having seen any of the HMRC publicity and, if he had, he would have referred them to his accountants. He had previously dealt with the PAYE payments himself as he paid by cheque.

18. He stated that there was no logic to his always paying two or three days late but he had "got away with it" for twenty years and was simply not aware that things had changed.

19. Since becoming aware of the new regime the appellant had always paid on time. His accountants deal with the payments and pay electronically. For the year in question his PAYE liabilities had been greater than normal as a result of extra temporary staff being employed.

Appellant's submissions

20. Mr Moore submitted that the case was unique because of the circumstances surrounding the penalty. It was unique because the payments were only two to four days late each month.

21. The appellant had run its business this way for many years and during the year in question they were not aware of the new regime. Since then the appellant has paid on time each month.

22. Mr Moore submitted that the penalty was substantial bearing in mind that the appellant's non-compliance was not substantial. He asked that the penalty be reduced. He submitted that in *Agar Ltd v HMRC* [TC01625] the taxpayer paid some fourteen to thirty-two days late and ignored telephone calls from HMRC.

23. He submitted that although the new regime had been publicised it had not been sufficiently publicised so that taxpayers became fully aware of the potential cost of the penalties.

24. He submitted that as a result of the temporary increase in staff the liabilities had been greater than normal.

25. He submitted that the matter appeared similar to the First-Tier Tribunal case of *Hok Ltd v HMRC* [TC01286] in which Judge Geraint Jones QC stated that there was no logical reason why HMRC would delay four months before sending out a penalty notice and as an arm of the state HMRC had a common law duty of fairness.

26. He submitted that HMRC had to apply fairness and proportionality. The penalty was completely out of proportion to the fault. He submitted that the penalty should have been raised for the first month's late payment with the penalty notice being sent out immediately.

27. He therefore submitted that the penalty should be limited to that which would have been raised on the first month's late payment.

HMRC's submissions

28. Ms Evans submitted that there was no leeway under the Schedule for the application of fairness. On the question of proportionality, this case could not be

compared to *Enersys Holdings v HMRC* [TC00335] and the penalty in this case was not disproportionate or plainly unfair.

29. She submitted that the appellant had no reasonable excuse for the late payments.

30. She submitted that although the Tribunal had certain powers under paragraph 15(3) of the Schedule this was exercisable only if HMRC's decision on the application of paragraph 9 which refers to a "special reduction" in special circumstances was flawed.

31. She submitted that HMRC had considered a special reduction but decided that this was not relevant i.e. there were no circumstances special to this appellant.

32. She referred, in relation to the special reduction, to the case of *David Collis v HMRC* [TC01431] and stated that HMRC's decision was not demonstrably so perverse that no authority could reasonably have reached it.

33. HMRC had done no more than apply the penalty that they were bound to impose under paragraph 11 of the Schedule.

34. She submitted that the rate of the penalty could only be determined at the year end when the total number of late payments made during the tax year could be determined. Before the end of the tax year this number could not be known. The regime could therefore not be compared to the penalty in the *Hok* case where the penalties were fixed at a certain amount each month.

35. Ms Evans referred us to correspondence between HMRC and the Tribunal, copied to the appellant, about HMRC's reconsideration of the amount of the penalty following the *Agar* case, which had held that a default in paying the Month 12 payment was not a default in the tax year of which that was the last month. HMRC therefore asked the Tribunal to reduce the penalty to £9671.57.

Findings

36. We found that the appellant had a record of late PAYE payments, that the new penalty regime was well publicised by HMRC and that the appellant would have been sent a penalty warning letter early in the tax year 2010/11. We found therefore that a responsible employer should have been well aware of the likely effect of making late PAYE payments.

37. We found that the legislation is clear. If a PAYE payment is made late even by one day then in accordance with paragraph 11 of the Schedule HMRC must impose a penalty the rate of which is dictated solely by the number of late PAYE payments apart from the first.

38. We examined the case of *Hok* but found that the legislation here is very different from that considered in that case, in that it was not possible to calculate the penalty until the end of the tax year and so a penalty notice could not have been issued after month 1 as submitted by the appellant. In the legislation considered in

Hok, a separate penalty arose for each month following a single failure to make a return until the return was submitted, and the Tribunal considered it unfair that no notification was made to the appellant until at least 4 penalties had been incurred.[1] But in any event we hold that HMRC did notify the appellant of its vulnerability to penalties shortly after the first default.

39. As to proportionality, the Tribunal observes that in *Total Technology Ltd* [TC01323] it was noted that this test sets a high threshold before a court or tribunal can find that a penalty, correctly levied on the tax payer under legislative provisions conferred by Parliament, may be struck down as disproportionate. The penalty in this case might be said to be harsh given that payment was never more than 6 days late and was usually 2 or 3 days late, but it was not plainly unfair in *Enersys* terms.

40. We found that there were no special circumstances relating to this appellant that would allow us to substitute a decision for that of HMRC taking account of paragraph 9 as we are empowered to do by paragraph 15(3) of Schedule 56. Nor did the appellant have any reasonable excuse for the late payments within the scope of paragraph 16. We did not consider that any failure on the part of HMRC to issue a specific warning to the appellant could amount to either special circumstances or a reasonable excuse. HMRC had made several attempts to speak to the appellant and remind them that the payments were late.

41. For the above reasons we found that the penalty was correctly imposed, but in accordance with paragraph 13(2) of Schedule 56 we vary the assessment to reflect the post-*Agar* recalculation.

Decision

42. The appeal, so far as it is made under paragraph 13(1) of Schedule 56 (liability to a penalty), is dismissed. The appeal, so far as it is made under paragraph 13(2) of Schedule 56 (amount of the penalty), is upheld and HMRC's decision (as expressed in its assessment) is varied in accordance with paragraph 15(2) of Schedule 56 to reflect that there were only 11 defaults in the tax year rather than the 12 assumed by HMRC in making its assessment. The penalty is varied to become £9671.47.

43. 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

[1] It is possible, as the Tribunal pointed out to Ms Evans, that a penalty assessment could be made "in year" followed up if necessary by one or more supplementary assessments, as set out in paragraph 11(5) of Schedule 56. HMRC's Compliance Handbook at paragraph 152100 confirms this, saying "We normally assess the penalties after the end of the tax year but if necessary we can assess them during the year." and the Handbook goes on to give examples of how to calculate "in year" penalties. We would not, however, expect HMRC to operate an "in year" assessment basis routinely as clearly Parliament has imposed a single penalty finally calculable only after the year end, and this still makes the case very different from that in *Hok*.

"Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

SANDY RADFORD
TRIBUNAL JUDGE

RELEASE DATE: 17 September 2012