



**TC02763**

**Appeal number: TC/2012/10440**

*INCOME TAX – PAYE – penalty for late payment – Schedule 56 Finance Act 2009 – reasonable excuse – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**WEIGHTLIFTER BODIES LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: MR G. NOEL BARRETT LLB (Presiding Member)  
MR A REDDEN FCA**

**Sitting in public at Phoenix House, Rushton Avenue, Bradford on 25<sup>th</sup> March 2013**

**Mr K Hunt Company Director for the Appellant**

**M/s J Bartup of HM Revenue and Customs, for the Respondents**

## DECISION

### *Introduction*

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1. This is an appeal against penalties of £18,456.06 for late payment of PAYE and National Insurance during tax year 2011-12.

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2. The Appellant has a highly skilled workforce manufacturing commercial truck bodies and trailers for the house building and road building industries. It trades with multi-national companies such as Tarmac and Lafarge.

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3. The Appellant also has a long established trading relationship with Volvo/Scania, who are major international truck manufacturers.

4. The Appellant made its payments to HMRC for months 1 to 9 inclusive by electronic means and for month 10 by cheque.

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5. The Appellant does not dispute the facts of this case; namely that the Appellant made late payment of PAYE during each of months 1 to 10 (inclusive), of tax year 2011-2012.

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6. Mr Hunt on behalf of the Appellant offered his apologies to the Tribunal for the late payments.

### *The Law*

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7. The provisions of *Schedule 56 Finance Act 2009* operate so as to impose a penalty at the end of the tax year by reference to the total number of defaults in the tax year. However the first default in any tax year is disregarded altogether, (*paragraph 6(3) Schedule 56 Finance Act 2009*)

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8. The amount of the penalty varies as provided by *sub-paragraphs (4) to (7) Schedule 56 Finance Act 2009*:

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“(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.

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(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.

(P means a person liable to make payments)”

9. The due date and receipt for payments derives from *Regulation 69(1) Income Tax (PAYE) Regulations 2003*.

Electronic payments must be made “*within 17 days after the end of the tax period*” and “*by an approved method of electronic communication*”.

Non electronic payments must be made “*within 14 days after the end of the tax period*”.

The tax period ends on the 5<sup>th</sup> of each month.

Therefore electronic payments must be made by 22<sup>nd</sup> of each month and non-electronic payments must be made by the 19<sup>th</sup> of each month.

By *Regulation 219* if payment is made by cheque and the cheque is met on first presentation then payment is treated as having been made on the date HMRC received the cheque.

10. *Paragraph 9* referred to in paragraph 15 *Schedule 56 Finance Act 2009* 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.”*

11. *Paragraph 16 Schedule 56 Finance Act 2009* provides that:

“*Failure to make a payment will not give rise to a penalty if the tax payer satisfies the tribunal that there is a reasonable excuse for the failure. But an insufficiency of funds is not a reasonable excuse unless attributable to events outside the tax payers control. Nor is it an excuse where the tax payer relies on another person to do anything unless the tax payer took reasonable care to avoid the failure; and where the tax payer had a reasonable excuse for the failure but the excuse has ceased, the tax payer is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse has ceased.*”

## *Findings of Fact*

5 12. The Appellant appealed on the grounds of reasonable excuse; that it had suffered an insufficiency of funds which was attributable to events outside its control.

10 13. There was no dispute as to the underlying facts which we find as follows.

14. The Appellant had 9 defaults for the purposes of the penalty regime in *Schedule 56 Finance Act 2009* which resulted in a penalty at the rate of 3% amounting to £18,485.06

15 15. Mr Hunt submitted that the Appellant Company had a reasonable excuse for all of the defaults based on the Appellants insufficiency of funds arising from a number of external factors, which factors were all beyond the Appellants control.

20 During 2008 at very short notice the Appellant was faced with being dissolved due to the family owners no longer being interested in continuing the business. At that time the Appellant Company was making good money, its margins were good and the management team firmly believed that the Appellant had a good business model. A management buy-out ensued, very shortly after which  
25 in late 2008 early 2009 upon the collapse of the economy the Appellants turnover dropped considerably as a result of which the Appellants cash flow became severely restricted.

30 The Appellant has a highly skilled and trained workforce and it proved very difficult to establish alternative revenue streams quickly.

Tarmac and Lafarge decreased their orders from 600 truck bodies per year to just 50.

35 During the early part of 2011 Volvo/Scania unilaterally and “overnight” altered its settlement terms with the Appellant from 14 to 45 days and much as the Appellant would have liked to litigate over this, litigation would not, Mr Hunt said, have been a commercial option.

40 As a result of the Appellants trading position it was unable to secure loan facilities from its bank, only securing new facilities in March 2012.

45 The Appellant restructured joining together with three other related companies during mid-2011 and reduced the number of its factories from five to three in an attempt to improve profitability.

16. These facts were not challenged and we accept them. However we do not accept that the Appellants evidence of its reduced order book causing it cash flow difficulties and a consequent shortage of funds amounts to a reasonable excuse within the period of these defaults. These events seem to have taken place  
5 some months if not a year or two before the late payments of PAYE which occurred during the tax year 2011-2012.

17. M/s Bartup exhibited a computerised summary record of telephone conversations which took place between HMRC and the Appellant during the  
10 2011-2012 tax year a number of which conversations had in fact been made between HMRC and Mr Hunt vis:-

On 28<sup>th</sup> June 2011 Mr Hunt had said; “that the May payment was late due to his being away on business.”  
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On 28<sup>th</sup> July, (Emily) at the Appellant Company had said; “that the June payment was late due to ill health.”

On 30<sup>th</sup> August Mr Hunt said; “*that the July payment was late due to cash flow.*”  
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On 28<sup>th</sup> September Mr Hunt said; “*the August payment was late due to holidays.*”  
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On 28<sup>th</sup> October Hilary Webb at the Appellant Company said; “*that the September payment had been made late because she was unaware of the procedures.*”

On 28<sup>th</sup> November Mr Hunt confirmed; “*that the October payment was late; due to cash flow.*”  
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On 28<sup>th</sup> February Mr Hunt again said that the January payment was late due to cash flow.  
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On 27<sup>th</sup> March Mr Hunt again said, “*the February payment was late due to awaiting payments from customers.*”

18. Mr Hunt did not dispute the summary record and accepted that the  
40 summary record was accurate.

19. We also accept the summary records of the telephone conversations which took place at the time the defaults occurred and not subsequently. Consequently we prefer these records and the reasons provided for late payment  
45 within them, over the reasons as to shortage of funds provided by the Appellant, which reasons do not seem to have arisen at or around the time of the defaults.

***Reasonable Excuse***

5           20.           The burden of establishing reasonable excuse lies on the Appellant.

21.           Mr Hunt told the tribunal that external events, which were outside the Appellants control, resulted in the Appellant having insufficient funds to enable it to make payment of PAYE on time. Citing as he did the economic collapse in late 2008, early 2009, and the Appellants trading and cash flow difficulties arising from its greatly reduced order book and the sudden extension of settlement terms by the Appellants main customer, during the early part of 2011.

22.           We accept that the general economic collapse in late 2008, early 2009 was outside the Appellants control, however we do not accept that it can amount to a reasonable excuse for an insufficiency of funds, resulting in late payment some two years later.

23.           Mr Hunt did confirm to the tribunal that extended terms for settlement were enforced “overnight” by Volvo/Scania during the early part of 2011, but his evidence is contradicted by HMRC’s summary record of telephone conversations (which took place at the actual time of the defaults), between themselves and the Appellant, which telephone conversations Mr Hunt confirmed he did not dispute. The excuses given for late payment in May and June were that Mr Hunt was away on business during May 2011 and of ill health during June. No mention was made at that time that the late payments were attributable to cash flow difficulties.

24.           It was not until August 2011 that Mr Hunt first mentioned cash flow difficulties. But alternative excuses, which we do not believe could amount to a reasonable excuse, were then given in the following months. In September 2011 the excuse for late payment was due to holidays and in October 2011 the excuse was due to the Companies employee, M/s Webb being unaware of the procedures.

25.           Whilst cash flow difficulties were mentioned by the Appellant in the telephone records during November 2011 and February and March 2012, no evidence of any reasonable excuse arising from any shortage of funds arising at that time has been provided by the Appellant. On the contrary Volvo/Scania had unilaterally altered its settlement terms in early 2011.

26.           We do have some sympathy for the Appellant, who has clearly due to general economic factors suffered a very difficult trading position over the past few years. However for the reasons already give we do not accept that there is a sufficient nexus between the events re-counted by Mr Hunt as to shortage of funds and the late payments, such as to amount to a reasonable excuse.

### ***Proportionality***

5 27. Although the Appellant did not specifically invite the tribunal to  
consider whether it had been given proper notification of the default penalties  
likely to be imposed, or as to whether the amount of those penalties once imposed  
were in fact reasonable, we think it is important, as the Appellant commented  
upon the hardship the penalties would cause, that we explain our decision in  
10 respect of these matters.

28. We accept that HMRC did try to inform all employers about the new  
penalty regime and in this particular case HMRC, as we have already noted,  
15 contacted the Appellant on a number of occasions during the period of default  
informing the Appellant that penalties may be incurred.

29. In our view any ignorance of the law on the Appellant's part as to the  
actual amount of the penalties likely to be imposed by HMRC cannot constitute a  
20 good ground of appeal.

30. We also accept that the amount of the penalty imposed, particularly for  
paying just a few days late, may seem to the Appellant harsh. However we do not  
believe that the penalty is either "plainly unfair" in the terms of the earlier case of  
25 *Energys Holdings UK Limited v HMRC [2010] UKFTT 20*, nor in our opinion is  
the penalty devoid of reasonable foundation. The new penalty regime has been  
imposed by HMRC strictly in accordance with the legislation as enacted by  
Parliament, and the penalty itself increases proportionally with the number of  
defaults. We are not satisfied therefore that the penalty imposed is in any way  
30 disproportionate. Nor do we find that there has been any unfairness in the  
approach of HMRC, in the way it publicised the introduction of the penalty  
regime or in notifying the defaults, or the penalty to the Appellant.

31. Furthermore as recently decided by the Upper Tribunal in *Hok v*  
*HMRC [2012 UKUT 363 (TCC)]* at paragraph 41, this tribunal has in any event  
35 no judicial review function, nor can this tribunal apply principles of common law  
in determining the penalty. As such this tribunal cannot therefore interfere with  
the penalties laid down by Parliament simply on the grounds of unfairness. The  
Upper Tribunal confirmed at paragraph 56 of their decision in *Hok* that;

40 *"Once it is accepted, as for the reasons we have given it must be, that the*  
*First-tier Tribunal has only that jurisdiction which has been conferred on it by*  
*statute, and can go no further, it does not matter whether the Tribunal*  
*purports to exercise a judicial review function or instead claims to be applying*  
*common law principles; neither course is within its jurisdiction"*  
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*Decision*

32. In the circumstances we dismiss the appeal.

33. 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.

**G. NOEL BARRETT LLB  
TRIBUNAL PRESIDING MEMBER**

**RELEASE DATE: 25 June 2013**



