



TC03051

Appeal number: TC/2013/01806

Income tax PAYE – penalty for late payment - Sch 56 FA 2009 – effect of HMRC decision to delay assessing penalties until after year end – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

P & H CLEANING COMPANY LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE CHARLES HELLIER
DEREK SPELLER**

Sitting in public in Sutton on 1 October 2013

Colin Thomas of Thomas Price & Co, accountants, for the Appellant

Karen Weare, for the Respondents

DECISION

5 1. P & H Cleaning appeal against penalties totalling £5,715.25 assessed by HMRC under Schedule 56 FA 2009 in respect of the late payment of PAYE on eight occasions during 2011/12.

10 2. HMRC's review of the penalties was notified to the taxpayer by letter of 1 February 2013. The notice of appeal was received by the tribunal service on 7 March 2013. It was therefore a few days late. The delay was caused by a virus in the appellant's computer system. Miss Weare did not object to an extension of time. We decided it was fair to permit the appeal to be heard despite the notice of appeal being out of time.

15 3. Schedule 56 provides that if a person pays PAYE late then he becomes liable to a penalty. The penalty is a percentage of the late paid tax. The penalty percentage increases from 1% to 4% as the number of defaults in the tax year increase. The first default of the year is ignored.

20 4. The Schedule permits HMRC to assess penalties for late payment immediately after the default arises and does not require them to wait till after the end of the tax year. The penalties under appeal were all assessed some six months after the end of the tax year in November 2012 at the rate of 3%.

25 5. If penalties had been assessed as the defaults occurred the percentage rate applicable to the earlier default assessments would have been smaller than 3%. If the taxpayer had continued to make defaults, then the Schedule would have permitted HMRC to reassess the earlier penalties and to charge them at the higher percentage which would apply to that greater number of defaults in the tax year.

30 6. Thus if a taxpayer's behaviour is unaffected by the assessment of penalties earlier in the year, the total penalty for the year would be the same whether they were assessed individually shortly after each default with a later adjustment, or in a bunch at the end of the year. But if the receipt of the penalty assessments early in the tax year changed the taxpayer's behaviour, so that he did not default later on in the year, then the total penalties would be less by reason of: (a) a lower percentage rate for the year, and (b) fewer defaults in respect of which a penalty was exigible.

7. Mr Thomas does not dispute that the payments were made late nor the arithmetical computation of the penalty. But he says:

35 (1) HMRC's actions in waiting until after the end of the year to assess the penalties rather than assessing them as they arose was unreasonable; and

(2) in the circumstances that penalties were "plainly unfair".

(1). The assessment of penalties after the end of the year.

8. Mr Thomas says that the tax payers' charter requires HMRC to help and support a taxpayer in its duties. The late assessment of penalties does neither. The regime, he says, is intended to provide a correcting kick to the taxpayer when he is going off the rails: it permits HMRC to administer correction early to assist in keeping the taxpayer
5 on track. The assessment of penalties in a single block some six months after the year end provides no help and no encouragement to compliance - it resembles a money collecting exercise only. What is sauce for the goose should be sauce for the gander: HMRC should have made assessments in reasonable time.

9. Mr Thomas accepts HMRC made telephone calls to the taxpayer during the
10 year: - on 24 May 2011, 24 August 2011 and 23 September 2011. But he says that they did not tell the taxpayer that it had incurred penalty or that the penalty percentage was increasing.

10. He also accepts that HMRC's systems indicate that the taxpayer was sent a
15 letter on 28 May 2010 warning that because PAYE had not been paid on time it "may be liable" to a penalty, and also a letter on 27 May 2011 warning that because PAYE had been paid late there was a risk of penalties. But he says that the taxpayer's administrative systems were rigorous and tightly administered and there was no record of the receipt of these letters. In any event the letters did not indicate that a penalty had been incurred.

20 11. He says: that HMRC's communications did not fairly indicate that the penalty had been incurred, simply that one might be incurred; that it is only fair to have the opportunity to pay the fine and change behaviour before the fine goes up; and HMRC thereby failed in its duty to act evenhandedly.

25 12. Miss Weare told us that HMRC's Board made a policy decision to exercise its discretion so as not to assess penalties as they arose but to wait till after the end of the year; she said that the issue of warning letters and the making of warning telephone calls discharged HMRC's duty to help taxpayers comply. She says that it would be administratively burdensome to issue penalties as they arose (as is done in the VAT regime) and that HMRC's decision was reasonable.

30 13. It seems to us that this ground of appeal is outside our jurisdiction. We are given power by the statute to determine whether, on the proper application of the words of the statute, a penalty is in fact due and, if so, what, in accordance with the statute, its proper amount should be. On an appeal against a penalty we are not given jurisdiction
35 to regulate or review HMRC's behaviour, or to adjust the penalty on the basis that its behaviour falls short of any particular standard

14. It may be that other bodies such as the adjudicator or the ombudsman have a remit which would enable them to consider whether HMRC's behaviour in this case or generally was fair, and to provide a remedy if it was not; but that does not lie within our powers.

40 (2). *In the circumstances the penalty was plainly unfair.*

15. Mr Thomas says that the penalties are disproportionate or plainly unfair and so should be set aside. He says that the following circumstances make the penalties plainly unfair:

(1) HMRC's actions and inactions recorded above;

5 (2) the fact that for most of the months in question the payment was only a few days late; and

(3) that the taxpayer was required to account for VAT on the basis of invoices delivered. This meant that at the end of most quarters, when it became liable to pay VAT, it had not received the cash from many of its customers which would represent that VAT. The company bore the cost of funding HMRC. He showed us a schedule showing that, for example, for the quarter ending 31 December 10 2012 the company was obliged to account for £15,093 in VAT which it had yet to receive from its customers. This unfairly deprived a company of resources to pay its PAYE liabilities.

15 *Discussion*

16. In *HMRC v Total Technology (Engineering) Limited* [2012] UKUT 418 (TCC). The Upper Tribunal accepted that if it could be shown that a VAT penalty was wholly unfair or disproportionate a tribunal might, in exceptional circumstances, set it aside. But that case related to VAT which, because has its roots in the EU Directive, is suffused with EU legal principles such as proportionality. By contrast the penalties 20 under section 56 have a purely UK genesis. The doctrine of proportionality can affect them only if that doctrine can get in through the door of the Human Rights Act 1998.

17. In *HMRC v Hok* [2012] UK UT363 (TCC) the Upper Tribunal considered whether this tribunal had the power to set aside a penalty on the grounds of 25 unfairness. It held that it did not. At [37] the Upper Tribunal specifically approved the decision of Malcolm Gammie QC sitting as a Special Commissioner in *Bysermaw Properties Ltd v HMRC* [2008] STC (SCP) 322, in which he held that the effect of section 6(2)(b) of the Human Rights Act 1998 meant that, because the penalty in that case was imposed under primary legislation, which could not be read differently, a 30 remedy under that Act did not arise even if the penalty was disproportionate.

18. In this case the penalties are imposed by primary legislation in a form which is mechanical and precise: there is no room in the relevant provisions to read them as qualified by any saving for proportionality. Section 6(2)(b) bars the taxpayer from any remedy.

35 19. The Upper Tribunal in *Hok* also held that this tribunal has no jurisdiction in this type of appeal to interfere with HMRC's actions or to declare that because of their unfairness of penalty should be set aside.

20. For these reasons Mr Thomas' second argument must also fail.

Conclusion

21. We dismiss the appeal.

Rights of appeal.

22. 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.

23.

CHARLES HELLIER
TRIBUNAL JUDGE
RELEASE DATE: 14 November 2013