TC03123

Appeal number TC/2013/04067

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

FIRST-TIER TRIBUNAL
TAX CHAMBER

DENWIS LIMITED **Appellant**

- and -

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

TRIBUNAL G. NOEL BARRETT LLB PRESIDING MEMBER
JUDGE DAVID DEMACK

Sitting in public at Alexandra House, The Parsonage, Manchester on 12 August 2013

Mr D Stephenson Finance Director, for the Appellant

M/s S Whitley of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The Appellant is a property management company and service company.

2. It is appeals against penalties for late payment of PAYE and NIC during the tax year 2011-12.

3. In total it defaulted on 9 occasions during the tax year. Its first default in May 2011 was properly disregarded, leaving 8 defaults which counted towards penalties.

4. Those 8 defaults totalled £110,332.89 and attracted a penalty calculated at a rate of 3%, £3,309.98

5. The Appellant appeals both on the grounds that it has a reasonable excuse for late payment and that the penalties would cause it additional hardship.

The Law

6. From 6th April 2010 new penalties for late payment of PAYE and NICs were introduced under the provisions of Schedule 56 Finance Act 2009. They operate by imposing a penalty at the end of the tax year by reference to the total number of defaults in a single tax year. However the first default in any tax year is disregarded altogether, (paragraph 6(3) Schedule 56 Finance Act 2009).

7. Prior to the introduction of the new penalties it was possible for employers to delay payments without incurring any penalties.

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

> "(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.
>
> (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".

10. The tax period ends on the 5th of each month. Therefore electronic payments must be made by the 22nd of each month and non electronic payments must be made by the 19th of each month.

11. By Regulation 219 of the 2003 Regulations if payment is made by cheque and the cheque is met on first presentation payment is treated as having been made on the date HMRC received the cheque.

12. 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."

13. Paragraph 16 Schedule 56 Finance Act 2009 provides that:

> "Failure to make a payment will not give rise to a penalty if the taxpayer 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 taxpayer's control. Nor is it an excuse where the taxpayer relies on another person to do anything unless the taxpayer took reasonable care to avoid the failure; and where the taxpayer had a reasonable excuse for the failure but the excuse has ceased, the taxpayer is to be treated as having

continued to have the excuse if the failure is remedied without unreasonable delay after the excuse has ceased."

The Evidence and our Findings of Fact

14. From the documents provided to us, and the oral evidence of Mr Stephenson, the Appellant's Finance Director and Mr Rawlinson its Head of Corporate Affairs for the Appellant. We make the following findings of fact.

15. Mr Stephenson explained and we accepted that the Appellant's derived its revenue from two sources; firstly the rents it collected on a former mill in Preston which it owned; and secondly from management and administration fees it charged its majority shareholder on the collection of rents, on his personal residential and commercial properties. He also explained that the majority shareholder had for many years allowed the Appellant to retain the monies it collected on his (the majority shareholders) behalf, to finance the on-going business of the Appellant, but had now withdrawn that arrangement.

16. Mr Stephenson accepted that the Appellant had been late with its payments, explaining that;

> "As a responsible company the last thing we would want to do is to send a payment to HMRC which we knew we couldn't afford"

He also accepted;

> "Our records will show that we always do pay, albeit a bit late"

17. Mr Stephenson explained that since the start of the current recession the Appellant had suffered dramatic reductions in its revenue due to its rental properties falling empty. As a result funds available to it at critical times of the month varied and at times it found that it did not have cash flow sufficient to meet all its obligations. Despite this Mr Stephenson said that Appellant always endeavoured to pay its debts on time or as soon thereafter as funds permitted. We accepted what Mr Stephenson said.

18. He claimed that over the years the Appellant had sustained losses of £1,009,019, and that during the period in point in this appeal had suffered a loss of £89,290.

19. Although he mentioned hardship, Mr Stephenson did not explain to the Tribunal how the penalties assessed would create any hardship to the Appellant, additional to that it had already suffered as evidenced by its continuing losses, nor as to how any such hardship would constitute a ground for appeal within the legislation

20. Mr Stephenson did provide us documentary evidence to the Tribunal in the form of trading accounts or bank statements to corroborate the Appellant's cash flow problems, nor did he provide oral or documentary evidence to link the specific dates

of shortfalls in anticipated receipts to specific dates of defaults in payment of PAYE/NIC. Nor did he provide of any action the Appellant had taken to match its reduced revenue to its known financial commitments.

21. Mr Rawlinson gave oral evidence as to how the Appellant's defaults were attributable to failures by the Appellant's creditors, saying that it had

> "tried every single means of recovery of monies outstanding to it including telephone calls, emails, threats of legal proceedings by letters before action, the issuing of proceedings, attempts at enforcing judgements and oral examinations at Court"

He claimed that those events could not be interpreted otherwise than as being outside the Appellant's control, and that the actual date of payments to the Appellant by its creditors was;

> "absolutely and entirely beyond the Appellant's control and was totally and utterly within the control of the relevant creditor"

He thus submitted the Appellant's inability to make payments when they became due amounted to a reasonable excuse as provided for within paragraph 16 Schedule 56 FA 2009. We accepted Mr Rawlinson's factual evidence, but not his submission that the facts amounted to a reasonable excuse for the Appellant's defaults.

22. Mr Rawlinson failed to provide any evidence to link the Appellant's defaults with any specific unanticipated cash flow shortages by the Appellant. Nor did he explain how the Appellant was trying to manage or effectively balance its books.

23. Because the Appellant's representatives did not provide either documentary or further oral evidence linking its defaults to specific unanticipated events, the Tribunal offered it the opportunity of seeking an adjournment of the hearing to enable it to provide such evidence. The representative declined the other and the hearing continued.

24. Mr Rawlinson submitted as a matter of law that "P" as defined in sub-paragraphs (4) to (7) Schedule 56 Finance Act 2009 did not include a company, and that as the Appellant was "clearly and undeniably not a person" it was not liable to the penalties imposed. We do not accept this submission. It is a long established principle of English Law that a company is a legal person. If this were not the case a company would not be able to enter into contracts, nor would it be able to own property or employ individuals. If it was the case that a company was not a legal person then the individual Directors and Shareholders of a company would bear personal responsibility for such issues, rather than enjoying the protections which they do through corporate liability.

25. Ms Whitley, who represented HMRC, emphasized the lack of any documentary evidence to support the Appellant's claim. She submitted that in order to amount to a reasonable excuse, a shortage of funds had to be due to unforeseeable events outside the Appellant's control and had to be a direct or indirect cause of the default. This she

submitted was not the case with the Appellant's defaults, which were in her submission, the sort of cash flow difficulties which many businesses experienced as part of their normal business cycle and which should have been managed as part of their day to day operations. We accepted this submission.

26. She helpfully explained how the penalties assessed had been calculated, and claimed that there were no special circumstances, (as referred to in Paragraph 9 Schedule 56 Finance Act 2009) to exempt the Appellant from the penalties so much the Appellant and we accepted.

27. Ms Whitley also confirmed that the Appellant had a lengthy history of defaults and had continually paid its PAYE and NICs late since 2009. It had previously applied for and had been granted time to pay. This was not challenged by the Appellant and therefore we accepted it.

28. She also explained that time to pay arrangements were considered by HMRC to cover short terms problems and were granted to viable employers expected to be able to pay on time in the future. They were not intended to provide a continuous long term stop gap.

29. Ms Whitley made reference to HMRC's summary of contact with the Appellant. It showed the Appellant had said that its payment due in May 2011 was made late due to it having been overlooked and that the payment due in August 2011 had been made late due to holidays. Nowhere in the summary of contact was it recorded that the Appellant had claimed late payment to have been due to shortage of funds. The Appellants did not challenge HMRC's record and we therefore accepted it.

30. Although it was no part of the Appellant's case that it did not know about the new penalty regime, Ms Whitley invited us to note, that the summary of contact also showed that HMRC had contacted the Appellant by telephone about its defaults on a number of occasions and that several written warnings and notices requiring payment had been issued to it during the period of the defaults. She also provided us with details of the information and advice provided to the Appellant in regard to the penalty regime.

31. Ms Whitley concluded by explaining to the Tribunal that PAYE/NIC belonged to the employees from whose wages it had been deducted. It did not belong to the Appellant, nor should it be used by the Appellant to fund other parts of its business. It was for the Appellant to hand over the monies it had deducted from its employees in a timely manner and if it did not do this then the consequences of the penalties as imposed would flow.

Reasonable Excuse

32. The burden of establishing reasonable excuse lies on the Appellant.

33. The Appellant has not succeeded in establishing a reasonable excuse for its late payment of PAYE and NICs.

34. The only evidence provided by the Appellant in support of its claim that its income has been falling and that its business has made significant losses for a number of years was generic and evidence. It provided no documentary evidence to support its claim. Nor did it provide us with any direct causal link or details of specific examples where its cash shortages were sudden and unexpected, and resulted in its failure to pay PAYE/NIC on time.

35. In our judgment a reasonably prudent business man should take steps actively to manage his business and over a period of time to balance his income with outgoings. The Appellant provide no evidence to the Tribunal as to what steps, if any, it had taken to try to reduce its outgoings or increase its revenue.

36. Nor did the Appellant establish that its income diminished as a result of any sudden unexpected events which it could not reasonably have foreseen and have taken action to avoid.

37. We accept that HMRC tried to inform all employers about the new penalty regime and in the instant case HMRC, as we have already noted, tried to contact the Appellant on a number of occasions during the period of default to inform it that penalties may follow defaults in payments.

38. For these reasons we are unable to accept that the Appellant has a reasonable excuse for its defaults.

Proportionality

39. Although the Appellant submits that hardship, can constitute reasonable excuse, since in any event it failed to provide any detailed evidence as to how it would suffer the hardship as a consequence of paying the penalties, particularly its claim that the imposition of the penalties might result in it going into receivership or liquidation. The Appellant has suffered continuing losses over a considerable period of time; they must have been caused other than through the payments of these penalties. We do not accept that payment of the penalties imposed which are a comparatively small amount in comparison to the Appellants other losses, would of itself put the Appellant into receivership or liquidation.

40. The Appellant emphasised that its payments had in each case only been made a few days late and we 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 Enersys HoldingsUK Limited v HMRC [2010] UKFTT 20, or 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 disproportionate.

41. The purpose is to penalise tax payers for not paying by the due date.

42. As the tribunal in Dina Foods Ltd v HMRC [2011] UKFTT 709 (TC) observed at [41] and [42] and which we follow;

> "41. The issue of proportionality in this context is one of human rights, and whether, in accordance with the European Convention on Human Rights, Dina Foods Ltd could demonstrate that the imposition of the penalty is an unjustified interference with a possession. According to the settled law, in matters of taxation the State enjoys a wide margin of appreciation and the European Court of Human Rights will respect the legislature's assessment in such matters unless it is devoid of reasonable foundation. Nevertheless, it has been recognised that not merely must the impairment of the individual's rights be no more than is necessary for the attainment of the public policy objective sought, but it must also not impose an excessive burden on the individual concerned. The test is whether the scheme is not merely harsh but plainly unfair so that, however effectively that unfairness may assist in achieving the social objective, it simply cannot be permitted.
>
> 42. Applying this test, whilst any penalty may be perceived as harsh, we do not consider that the levying of the penalty in this case was plainly unfair. It is in our view clear that the scheme of the legislation as a whole, which seeks to provide both an incentive for taxpayers to comply with their payment obligations, and the consequence of penalties should they fail to do so, cannot be described as wholly devoid of reasonable foundation. We have described earlier the graduated level of penalties depending on the number of defaults in a tax year, the fact that the first late payment is not counted as a default, the availability of a reasonable excuse defence and the ability to reduce a penalty in special circumstances. The taxpayer also has the right of an appeal to the Tribunal. Although the size of penalty that has rapidly accrued in the current case may seem harsh, the scheme of the legislation is in our view within the margin of appreciation afforded to the State in this respect."

43. Furthermore as recently decided by the Upper Tribunal in Hok v HMRC [2012 UKUT 363 (TCC)] at paragraph 41, which we again follow, this tribunal has in any event no judicial review function, nor can it 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;

> "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"

44. As a result it is clear to us that we do not have the power to allow this appeal on the grounds of proportionality, (even if we were minded to do so, which we are not).

Decision

45. In the circumstances we dismiss the appeal and confirm the penalties in the sum of £3,309.98.

46. 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: 10 December 2013