



TC03129

Appeal number: TC/2013/00305

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Penalties for late payment of PAYE – reasonable excuse – penalties unfair by reference to size of business and amount of tax due – notification of penalties from HMRC inadequate – held – no reasonable excuse – penalties not unfair or disproportionate – HMRC notification procedure matter of administrative law outside Tribunal’s remit – appeal dismissed.

CLARITY COPIERS (WESTERN) LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE RACHEL SHORT
MR D EARLE**

**Sitting in public at Keble House Southernhay Gardens, Exeter EX1 INT on 6
June 2013**

Mr Bolt for the Appellant

**Ms Adlam, instructed by the General Counsel and Solicitor to HM Revenue and
Customs, for the Respondents**

DECISION

- 5 1. This is an Appeal against a penalty of £2537.24 for late payment of PAYE for the periods May 2011 to April 2012 under Schedule 56 Finance Act 2009.

Facts

- 10 2. On behalf of the Appellant Mr Bolt explained that the Appellant carries on business as a distributor of copiers and printers and was set up in 1980 and now employs six members of staff. During the relevant period the Appellant was suffering from cash flow problems due to increased competition and changes in technology. The company was forced to set up a £40,000 over draft facility in June 2012 and Mr Bolt himself reduced his salary to help the company survive. The Appellant agreed a “time to pay” arrangement with HMRC in respect of its VAT payments for 2010 but did not make similar arrangement for PAYE. PAYE payments were due on the 19th of each month but were consistently made up to seven days late for each month during the May 2011 – April 2012 period, being on average paid three days late.
- 15 3. Until the periods to which these penalties relate the Appellant had regularly paid its PAYE 15 – 30 days late and had not incurred penalties. The Appellant’s PAYE payments were handled by Mr Bolt’s wife, but he signed the cheques for payment to HMRC which he would do whenever he had time.
- 20 4. HMRC wrote to the Appellant and notified it of the new penalty regime in May 2010 and also sent a specific letter warning of PAYE penalties in May 2011 and spoke to the Appellant by telephone on 28 July 2011 to warn of PAYE penalties.
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Taxpayer’s Arguments

- 30 5. On behalf of the Appellant Mr Bolt accepted that the PAYE payments for the periods June 2011 – March 2012 had been made late, but argued that the penalty was unfair given the small number of days by which the payments had been late for every month. He described the penalties as “ludicrously high” in the context of a small company such as the Appellant and “heavy handed”. Mr Bolt also said that, while HMRC had contacted him by telephone and letter regarding the late payment and imposition of penalties, their communications had not been sufficiently specific about the level or timing of penalties. He had regularly paid PAYE late in the past and had not received a penalty. Mr Bolt did not consider that the standard computer generated letters which HMRC sent him made the risk of penalties being imposed sufficiently clear and thought that they were “junk mail”.
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- 40 6. My Bolt referred to a number of general financial issues which the Appellant had suffered as a result of the recession, but did not point to any cash flow

problems which particularly impacted the periods in dispute. He argued however that HMRC should give consideration to the company's hardship.

HMRC's Arguments

- 5 7. On behalf of HMRC, Ms Adlam pointed out that the Appellant had been notified of the imposition of penalties (by letter and by telephone – including in for example in May 2011 and May 2010) and the Appellant had been sent HMRC's taxpayer information bulletin at the time when the new penalty regime was introduced in April 2010.
- 10 8. Since receiving the penalty notice in September 2012, the Appellant had paid its PAYE on time every month, demonstrating that there was no reason why the Appellant could not have done so for previous periods.

Decision.

- 15 9. The Appellant has accepted that these PAYE payments were made late and therefore the only basis on which these penalties can be disapplied is if the Appellant can demonstrate that it has a reasonable excuse for late payment under paragraph 16, Schedule 56 Finance Act 2009. While the Appellant did refer to cash flow problems, a lack of ability to pay is not a reasonable excuse for these purposes save in exceptional circumstances outside the taxpayer's control. On the basis of the evidence produced to the Tribunal, the Appellant's cash flow issues had been present for some time prior to the periods in question and were not of the unexpected or severe nature which might have given rise to a reasonable excuse due to a shortage of funds on the basis of the *Steptoe* decision ([1991] STC 302). The evidence here suggests that the Appellant could have taken reasonable steps to manage its PAYE payments in the same way as it had for VAT purposes, by entering into a time to pay arrangement with HMRC. This was not done and no adequate explanation was given for this.
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10. On the basis of the evidence provided, the Tribunal concluded that the Appellant did not have a "reasonable excuse" for late payment.
- 30 11. The Appellant argued that the level of penalty was unfair given the small number of days for which the tax was overdue and the level of tax payable as well as the small size of the Appellant company. The Tribunal has considered these arguments in the light of recent decisions concerning unfair UK tax penalties and the application of both the Human Rights Act and EU law. The leading case in this area is *Total Technologies* ([2012] UKUT 418 (TCC)). The courts have suggested that this Tribunal should be slow to overturn a penalty regime which has been implemented by statute and should do so only in extreme circumstances and if the penalty levied is manifestly inappropriate. In applying this test we have taken account of the Appellant's late payment history; this is not a situation in which a penalty is being levied for one instance of late payment, but for a consistent pattern of late payments over a
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twelve month period. Therefore we do not consider that the level of penalty as applied in these circumstances is plainly unfair.

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12. We have also considered whether the small size of this business means that this level of penalty is disproportionate as suggested by Mr Bolt. We think it does not for two reasons; the courts have concluded that the mere fact that a penalty regime may operate more harshly against small companies does not mean that it is necessarily disproportionate, second, the PAYE penalty regime itself takes account of a taxpayer's size (or number of employees) in calculating the penalty, imposing the penalty by reference to the amount of tax due.
 13. The Appellant also argued that HMRC's administrative procedures had fallen short in not properly notifying it of the fact that penalties were accruing despite the fact that penalties had not been applied in the past. In respect of these administrative procedures the Tribunal notes that these matters are outside its jurisdiction as made clear in the *Hok* decision (*HMRC v Hok* [2012] UKUT 363 (TCC)) and can properly be dealt with by a judicial review application only. Were the Tribunal able to opine on these matters it would conclude that on the basis of the evidence provided by HMRC the Appellant was notified of the risk of penalties on at least three separate occasions and that a reasonable taxpayer would have taken this as sufficient warning of the need to take action to avoid having to make a penalty payment.
 14. For these reasons this appeal is dismissed.
 15. 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.

RACHEL SHORT
TRIBUNAL JUDGE

RELEASE DATE: 11 December 2013