TC03135

Appeal number: TC/2013/03111

PAYE – late payment penalty – whether reasonable excuse where bank overdraft facility not offered – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

P J MARTINELI LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE DR K KHAN
CHRISTOPHER JENKINS

Sitting in Bedford Square on 24 September 2013.

John Jackson, Chartered Accountant for the Appellant.

Gloria Orimoloye, Presenting Officer, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents.

DECISION

Introduction

1. This is an appeal against a decision to issue a PAYE late payment penalty for the year ending 2011-2012 in the sum of £9,844.57.

2. The issue is whether the Appellant has a reasonable excuse for making the late payment of its PAYE/NIC monthly liabilities.

Background

(1) In the period between 5 May 2011 and 5 March 2012 the Appellant had 10 defaults that counted towards this penalty. The total amount of these defaults was £246,114.48 and the default penalty rate is 4% of that amount. The penalty is charged under paragraph 6 of Schedule 56 Finance 2009.

(2) On 30 January 2013, HMRC issued the Appellant a Penalty Determination for the year ended 5 April 2012.

(3) On 6 February 2013 the Appellant appealed the penalty on the grounds that the penalty was disproportionate to the offence and HMRC had a duty to mitigate the taxpayer's liability.

(4) On 15 February 2013 HMRC rejected the Appellant's appeal on the basis that there was no reasonable excuse for the late payment.

(5) On 5 March 2013 the Appellant made a request for an internal review of the penalty.

(6) On 18 March 2013 a letter was issued to the Appellant requesting any additional information.

(7) On 4 April 2013 HMRC's internal review was completed with the conclusion that the decision of HMRC should be upheld.

(8) On 12 April 2013 the Appellant appealed to the Tribunal.

The Law

Schedule 56 Finance Act 2009 allows a penalty to be charged when an employer fails to pay to HMRC its monthly PAYE/NIC payment by the due date.

The penalty date is the day after the date determined by or under PAYE Regulations as the date by which the amount should be paid.

These are:-

- Manual payment 14 days after month end (5th of each month) so due 19th, penalty date 20th.

- Electronic payment 17 days after month end (5th of each month) so due 22nd penalty date 23rd.

Paragraph 6(1) provides that an employer is liable to a penalty of an amount determined by reference to the number of defaults made during the tax year.

Paragraph 6(2) specifies that a default occurs if the employer fails to pay an amount of tax in full on or before the due date i.e. 19th or 22nd of the month (depending on the method of payment).

Paragraph 16 provides that if there is a reasonable excuse for the failure to pay on time then there will be no penalty, but paragraph 16 sub-paragraph (2) states that:

- an insufficiency of funds is not a reasonable excuse, unless attributable to events outside an employer's control.

- the reliance on somebody else to do something is not a reasonable excuse, unless reasonable care was taken to avoid failure.

- if there was a reasonable excuse for the failure that excuse is deemed to have continued if the failure is remedied without unreasonable delay once the excuse ceased.

Paragraph 13 provides the taxpayer with a right of appeal:

> Para.13(1) against a decision by HMRC that a penalty is payable
>
> Para.13(2) against a decision of HMRC as to the amount of a penalty.

On an appeal under paragraph 13(1) the Tribunal may affirm or cancel the decision – paragraph 15(1)

Regulation 67 and Schedule 4 to the Social Security (contributions) Regulations 2001 imposes the same requirements on an employer for the purpose of paying earnings related National Insurance contributions.

The operation of Schedule 56 was considered in *Dina Foods*. It was observed that:

(1) the legislation became operative with a commencement date of 6 April 2010, so that the first time penalties which could be raised under these rules was after the end of the 2010/11 tax year (at [11]).

(2) except in the case of special circumstances, the scheme laid down by the statute gives no discretion: the rate of penalty is simply driven by the number of PAYE late payments in the tax year by the employer (at [31]);

(3) the scheme of the PAYE legislation requires taxpayers to pay over PAYE on time; the legislation does not require HMRC to issue warnings to individual employers, though it would be expected that a responsible tax authority would issue general material about the new system (at [33]);

(4) lack of awareness of the penalty regime is not capable of constituting a special circumstance; in any event, no reasonable employer, aware generally of its responsibilities to make timely payments of PAYE and NICs amounts due, could fail to have seen and taken note of at least some of the information published and provided by HMRC (at [37]);

(5) any failure on the part of HMRC to issue warnings to defaulting taxpayers, whether in respect of the imposition of penalties or the fact of late payment, is not of itself capable of amounting either to a reasonable excuse or special circumstances (given that there is no separate penalty for each individual default, and the penalty can only be assessed once the aggregate of the late paid tax comprised in the total of the defaults for a particular tax year has been ascertained) (at [38] – [39]).

The Evidence

3. The Tribunal was provided with correspondence between the parties and a legislation and authorities bundle.

Appellant's Submissions

4. The Appellant made the following submissions:

(1) The penalty is disproportionate to the offence. While taxpayers can charge their clients 5% interest HMRC are attempting to charge 291% APR as interest. The legislation has clearly been used as a money-making exercise which disproportionately penalises the generally compliant small company.

(2) HMRC has a duty to mitigate the liability to the taxpayer wherever possible. The Appellant did receive a number of telephone calls from HMRC but no one quantified the potential penalty. If this had been done the Appellant believes they would have paid sooner.

(3) HMRC waited 10 months from the end of the year before raising the penalty. This gives the Appellant no chance to put matters right in the year to 5 April 2013. The Appellant feels that this delay was deliberate and penalty should have been raised in a timely manner.

(4) The Appellant is trading in very difficult times and larger companies are being let off lightly for example, Goldman Sachs is paying no interest on a taxable avoidance scheme.

(5) The Appellant believes they have been penalised at 4% for being just 4 days late whereas if they were 12 months late the rate would be 5%. This appears to be an incentive to delay payment for a year.

(6) The Appellant was given extra time to make further submissions which were made on 2 October 2013. The core submission made by Paul Martineli, Managing Director of the Appellant, was as follows:

> "I believe that throughout 2011/12 we were in a position where I believed new bank funding was going to become available any day but because of circumstances outside our control the promise of funding did not crystallise. In putting forward this argument of a "reasonable excuse" we cite the case of *CuCo v HMRC* [2013] UKFTT 121 (TC)."

The company also stated that they had great difficulty in arranging an overdraft facility with 4 changes in bank managers at the Lloyds Bank where they had business for over 20 years. This eventually forced a move to Barclays in late 2012. A lack of an overdraft facility appeared to have caused trading difficulties in the period December 2010 to August 2012. The Appellant indicated that they always felt "that extra facilities were going to be available shortly so I did not seek out a conversation with HMRC about late payment, but I did speak to someone from HMRC when they called me and I got very vague replies to my questions. They were unable to quantify what penalties might be served or whether they would in fact be served at all and generally gave the impression that at that stage they do not really understand how the legislation would operate in practice."

The Respondents' Submissions

(1) That there is no reasonable excuse for the late payment. The Appellant had full information from the HMRC website on the methods of payment and penalties. The penalty structure was widely consulted on and considered by Parliament as the best way to encourage compliance. The penalty rates are laid down by statute. There is no issue of fairness.

(2) PAYE is money the Appellant deducts from employees on behalf of HMRC and should not be used as a form of short term finance. This is unfair to the majority of employers who do pay on time and gives the Appellant an unfair commercial advantage.

(3) It is an employer's responsibility to pay on time. There is an obligation to make payment and lack of warning by HMRC is not an excuse for failing to make payment.

(4) The Tribunal has no general discretion to consider matters of proportionality and fairness and HMRC has no obligation to mitigate the penalty.

(5) The penalty was raised in a timely manner. The legislation requires a penalty to be made on or before the later of either two years after the date the penalty was first payable or 12 months after the end of the appeal period for the assessment for the outstanding tax.

(6) The fact that trading conditions are difficult does not provide a reasonable excuse. If the Appellant had difficulties with trading then an approach should have been made to Business Payment Support Services (BPSS) which was set up to help employers with payment problems. Information of this service is available. The Appellant did not once contact HMRC during the 2011/12 period before payment fell due to advise of any difficulties. The Appellant had letters of warning that a penalty would be imposed.

Discussion and Conclusion

(1) The Tribunal does not have a general discretion to consider issues of unfairness and proportionality. This has been made clear in the decision of the *Commissioners for Her Majesty's Revenue & Customs v Hok Limited* [2012] UKUT 363 (TCC). The general adverse trading conditions experienced by the Appellant and experienced by many traders in a similar position do not provide a reasonable excuse. It is accepted in the legislation at paragraph 6(2)(a) of Schedule 56, that an insufficiency of funds does not qualify as a reasonable excuse. An exceptional or unforeseen event, which causes an insufficiency of funds, may amount to a reasonable excuse.

(2) The Appellant's main argument focuses on the submissions made in their letter of 2 October which was provided after the conclusion of the hearing. The Appellant lays out a sequence of events from December 2010 to August 2012 which suggests that throughout that period the Managing Director of the business, Paul Martineli, believed that a solution was "just around the corner" and therefore continued to trade, albeit with difficulties but did not contact HMRC or seek any business payment support through the BPSS facility offered to employers with payment problem.

(3) The company for over 20 years banked with Lloyds Bank. Its relationship with that bank seemed to have deteriorated with different managers in the two year period between 2010 and 2012. The first bank manager increased the overdraft facility of £450,000 to cover the peak Christmas

period but then in March 2011 he reduced the facility back to £400,000. Another bank manager, in early March 2011 did not grant an increase in the overdraft facilities though an application was made by the Appellant to have such an increase. This situation continued in May 2011 when a new bank manager was appointed. In October 2011 an application was made by the Appellant for a temporary facility to cover the Christmas period, something which had been automatic in the past but which was now rejected. In December 2011 a new facility was offered by the bank but with various covenants which resulted in the Appellant Company rejecting the offer. In July 2012, the company moved its banking arrangements to another bank, Barclays, who offered, on less favourable terms, a banking facility. It was not explained to the Tribunal what that offer comprised though it seemed strange that that offer was accepted when the offer of December 2011 which appeared to be equally less favourable was rejected. However, the point being made by Mr Martineli is that it was his belief that extra overdraft facilities would have been available to the company to assist in trading and this never materialised. He was, as it were, living in hope and his hope did not result in a better facility for the Appellant Company.

(4) In order for there to be a reasonable excuse there must be exceptional or unforeseen events which caused insufficiency of funds but on the facts of this case there is nothing to suggest, in concrete terms, the reduction of the facility from £450,000 to £400,000 or the lack of an increase facility in the Christmas period did in fact result in the company being unable to meet its tax liability.

(5) The Appellant draws reference to the case of *CuCo v HMRC* [2013] UKFTT 121 where the Court held that a business had a reasonable excuse for late payment of PAYE and NIC contributions. The business had insufficient funds after its invoice finance supplier unexpectedly changed ownership and restricted its finance. The change in the invoices discounting facility had a significant effect on the Appellant's cash flow also a drop in the turnover and the refusal by the banks to provide funds and suppliers to give credit. The judge in that case, Sir Stephen Oliver, held that the "unforeseeable change in the invoices discounting facilities that occurred over the relevant period should be treated as a reasonable excuse".

(6) In the present case the Appellant Company had an overdraft facility but sought to increase that facility. The terms and conditions of the new facility were not to the Appellant Company's liking and were found to be unacceptable. This resulted in them changing banks where a new facility was offered albeit on similar unfavourable terms. While the Company would have been financially inconvenienced, especially in the Christmas period, when an additional facility would have been required the Appellant Company was still in a position to manage their cash demands to continue trading. There is nothing to suggest that there was a drop in

turnover of the business, staff were laid off or there was a significant reorganisation of the company due to the lack of an overdraft facility. The Tribunal believes that there are no special circumstances while recognising that trading conditions were difficult.

(7) A taxpayer who acted reasonably in the circumstances would have approached HMRC and made arrangement under BPSS scheme which helps employers with payment problems. Rather, the director of the company did not act as a reasonably competent businessman in the circumstances by simply putting off for two years a problem which was clearly visible and which had consequences for the business in the shorter term.

(8) While the concept of reasonable excuse is not defined in the legislation, there has to be exceptional circumstances which were beyond the taxpayer's control. While it has taken longer than anticipated to organise the overdraft facility, the Managing Director had passively accepted the situation when alternative finance arrangements should have been put into place to deal with what was clearly a problem for the company.

5. In the circumstances therefore the Tribunal finds that there is no reasonable excuse and the appeal is accordingly dismissed.

6. 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.

DR K KHAN
TRIBUNAL JUDGE

RELEASE DATE: 12 December 2013