TC03366

Appeal number: TC/2013/06156

Income Tax – penalty for late payment of tax – whether a reasonable excuse for late payment – no – appeal dismissed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

LINDA DAVIES **Appellant**

- and -

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

TRIBUNAL: JUDGE DR K KHAN
MS JANET WILKINS, CTA TEP

Sitting in Oxford on 7 February 2014

The Appellant represented herself.

Sian Howell, Case Worker, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The matter is an appeal by the Appellant against the imposition of a late payment penalty under Schedule 56 of the Finance Act 2009. The late payment is in relation to the 2011/12 Self-Assessment which was due and payable on 31 January 2013. The tax was not paid in full until 2 May 2013. Consequently a late payment penalty was charged in the sum of £3,342.

2. The issue for the Tribunal is whether the Appellant has a reasonable excuse for the late payment. It is not in dispute that the tax was paid late.

Background facts

(1) The Appellant was in the Self-Assessment system from 1998/1999 to the present time. After a gap of approximately 4 years she recommenced employment in April 2011 until she was made redundant in May 2012.

(2) Since the Appellant was not coming from employment and did not possess a P45 and was in receipt of a pension, a P46 Form had to be completed and provided to Her Majesty's Revenue & Customs ("HMRC").

(3) HMRC issued tax coding that authorised her employer to deduct tax at the basic rate, 20% only. A tax code was issued for one private pension on 15 March 2011 before the employment started. A new tax code for 2011/12 was issued to the Appellant on 14 February 2012 for one private pension. Neither tax code included the employment income. The employer filed a P 46 form giving notice to HMRC that the Appellant had started employment in April 2011. HMRC had no reason to issue a PAYE Code number to the employer as they had no indication of the level of salary being paid. Tax was therefore deducted from the Appellant's six figure salary at the basic rate of tax.

(4) The Appellant prepared some calculations to be used for her tax return and on 11 September 2012 she sent a completed paper 2011-12 tax returns to HMRC. The returns were successfully processed on 1 October 2012 and a calculation showing the amount of tax due was issued to the Appellant by HMRC on 2 October 2012.

(5) A Self-Assessment statement was issued to the Appellant on 11 December 2012 showing the amount of tax due and outstanding and the date by which the payment had to be made. The balancing payment for the 2011/12 year was £86,941.85 and the payment deadline for this sum was 31 January 2013.

(6) The Appellant paid the tax due in four instalments - £85.70 on 28 December 2012 (part of another payment), £20,000 on 7 February 2013, £40,000 on 26 April 2013 and £26,856.15 on 2 May 2013. Since the liability which remained unpaid at the due date was £66.856.15 a 5% penalty was imposed which amounted to £3,342.

Legislation

(1) TMA 1970 S.8 states that a person issued with an SA return must return it to HMRC on or before 31 October after the end of the end of the tax year in question (if it is filed on paper) or on or before 31 January after the end of the tax year in question (if it is filed electronically).

(2) TMA S.9 states that a person who is required to complete an SA return must also complete 'an assessment of the amount payable by him by way of income tax'. However, a person does not need to include this assessment with his SA return if he 'makes and delivers' his SA return on or before 31 October after the end of the tax year. In other words, HMRC will calculate the tax liability for those who file their returns before 1 November, but those who file later must calculate the tax themselves.

(3) TMA S.59B (4) states that tax unpaid for a tax year must be paid on or before 31 January following the end of the tax year in question. As a result, tax for 2011-12 must be paid by 31 January 2013.

(4) TMA S.59(C)(9) states that a reasonable excuse must exist throughout the "period of default"

(5) Regulation 14 Income Tax (Pay As You Earn) Regulations 2003 ("PAYE Regulations") provides that HMRC must have regard to certain matters "so far as known to them" in determining the code for the purposes of PAYE.

(6) Regulations 46 to 49 of the PAYE Regulations lay down the procedure for completing a P46 where the employer does not receive Form P45 and the code is not known.

(7) Regulation 50 of the PAYE Regulations confirms that the emergency code or the basic rate code used by the employer in accordance with regulations 47 to 49 is treated, for the purposes of Parts 2 to 4 (codes; deduction and repayment of tax; payments, returns and information) as having been issued by the Inland Revenue as the code for use in respect of the employee.

(8) FA 2009, Sch. 56, para 1 says that if a person fails to pay the tax due within 30 days following 31 January a penalty is payable. In the 2013 year, this means that a penalty is due if the tax is not paid by 2 March: 'the penalty date'.

(9) FA 2009, Sch. 56, para 3 sets the amount of the penalty at 5% of the tax unpaid by the penalty date.

(10) If a person is liable to a penalty HMRC 'must assess the penalty' (FA 2009, Sch. 56, para 11).

(11) There is no liability to a penalty if the person satisfies the tribunal there is a reasonable excuse for the failure (FA 2009, Sch. 56, para 16).

Appellant's submissions

(1) The Appellant went into some detail on the background to the Pay As You Earn (PAYE) history and explained that by the Government's own reckoning some 37% or 15 million taxpayers had unexpected demands for tax based on incorrect coding.

(2) The Appellant drew reference to the relevant legislation (see further submissions below) which explained that there was an obligation on HMRC to issue the correct coding to taxpayers. During the 2011/12 tax year at least two different tax coding were issued by HMRC, which were not correct. While all of the relevant information which HMRC needed to assess the correct coding was available to them and provided by the Appellant's employer, the correct coding was not issued.

(3) The Appellant assumed that PAYE was being deducted correctly and did not realise there was an error until a substantial tax demand (£86,941) was received. The Appellant claimed that she had no time before January 2013 to check through her salary details. The Appellant accepts that she had not checked her coding during her employment since, as explained, she "tackles her tax affairs in January of the year when the tax is due".

(4) The Appellant also explained that she had left the employment in May 2013 and had to get copies of electronic payslips from her ex-employer to check her salary figures. If she had known that the PAYE deduction had been so inadequate she could have better arranged her finances to make the payments of tax which were due.

(5) The Appellant takes the view that it is the responsibility of HMRC or her employer to prepare the correct tax coding during the year as it was clear to both parties that based on her salary the tax codings were wrong.

(6) She says that it is inequitable that she should have to pay penalties and interest which arose because HMRC did not issue the correct tax codes during 2011/12 and this is the reason that the late payment of tax arose.

The Appellant made further submissions, post hearing, on 10 February 2014. These were in response to HMRC's written speaking notes, a copy of which was provided at the end of the hearing on 7 February 2014.

The further submissions, comprising approximately 11 pages, are as follows:

(1) There were two Parliamentary Select Public Accounts Committee Reports which were critical of HMRC and highlighted that "the majority of taxpayers are not confident of the efficiency and correct execution of their duties in PAYE". This is because there are several errors and omissions dealing with taxpayer coding among other reasons.

(2) The understated tax, which is the subject of appeal, £86,941 for year 2011/12 was paid between January 31 and April 30, 2013.

(3) The Appellant referred to several provisions of the PAYE Regulations which included Regulations 8, 9, 13, 14, 15, 16, 17, 18, 21 and 46. These provisions were referred to in support of her core argument that it was the responsibility of HMRC to provide her employer and herself with the correct coding which, if done, would have meant the correct tax was deducted at source under the PAYE withholding system. In summary, the provisions provide:

    (a) Regulation 13 states that HMRC must determine the code for use by an employer in respect of an employee for the tax year;

    (b) Regulation 14 states *inter alia* that other PAYE and non-PAYE income be taken into account for PAYE and in setting the correct code.

    (c) Regulation 15 states that HMRC must determine that the code used by the employer is a higher rate code if they have reason to believe that the employee will be chargeable to tax at the higher rate.

    (d) For the purposes of P46, HMRC had the Appellant's employment history including the fact that she was a higher rate taxpayer for seven years. It was fair to assume that HMRC would make the appropriate higher rate coding. Further, if they did not have all relevant information they had powers to make reasonable enquiries to establish the correct coding.

    (e) Regulation 16 allows HMRC to use the code of a previous employer if they are unable to determine a code.

    (f) Regulation 17 states that HMRC must give the employer notice of the code which they have determined. In the circumstances, they did not allocate a code to the employer and did not inform the employee.

    (g) Regulation 18 allows an employee to object to a coding but since no code was provided, objection was not possible.

    (h) Regulation 21 allows the employer to deduct or repay tax in accordance with the Regulations by reference to the code of a previous employer if the employee had such a code or one was provided by HMRC. The Appellant did not have a previous code.

(4) The Appellant makes these points to show that there is a basic statutory obligation and requirement that HMRC provide a code to the employer to deduct tax at the correct amount at source.

(5) The P46 is put there by the employer and sent directly to HMRC. The employee is not involved.

(6) HMRC did not make any enquiries of the employee regarding her salary even though no salary information was provided by the employer.

(7) There is no statutory obligation on the employee to notify the employer or HMRC of the salary which is paid.

(8) Under Regulation 47, the employer had to submit the first five months calculations for the employee with the P46. This would have shown the salary level and tax deducted to HMRC.

(9) HMRC had all relevant information to establish a code or had the power to obtain the relevant information.

The Respondents' submissions

(1) HMRC says that they were not aware of all the relevant information for determining the Appellant's tax code. HMRC's system will automatically set up any new source of income (employment or pension) at basic rate when HMRC does not know the salary of the individual or no contact is made by the individual to notify HMRC of their salary. HMRC were not aware of the Appellant's salary as this is not recorded on the P46 which was issued electronically to HMRC by her employer. The electronic filing of the P46 was made on 8 June 2011. No contact was made by the Appellant to inform HMRC of her salary and therefore there was no updated code which was issued.

(2) HMRC first became aware of the Appellant's salary when her P14 was processed on 8 May 2012. The Appellant was then made redundant in June 2012. There was no updating of the Appellant's tax code because HMRC did not have the relevant information.

(3) Under Regulation 49 of the PAYE Regulations 2002, the employer must deduct tax using the basic rate code for any employee to whom Regulation 46(1) applies. Regulation 46 applies when an employee commences employment without giving the employer a P45 Form and a code in respect of the employee. The Appellant should have known that her salary would have taken her to the higher and then additional rate and should have contacted HMRC to advise them of her level of income so that appropriate adjustments could be made to her tax code.

(4) The Appellant would have been aware on 2 October 2012 of the amount of tax due and payable by the 31 January 2013 and had almost four months in which to make any necessary checks and pay the outstanding

tax by the due date. The Appellant had five months to make payment to avoid the late payment penalty.

(5) In the event that the Appellant was unable to make the necessary checks she should have arranged payment to HMRC by the due date and carried out her checks at a later date. If she had found an error in the figures she had entered on her return the return could have been amended at a later date.

(6) The Appellant stated that she had to obtain electronic copies of her payslip from her ex-employer to verify her salary. HMRC submit that as the Appellant had five months to make checks and payments to avoid a penalty, arrangements should have been made to do this within the relevant period.

(7) The Appellant submits that HMRC or her employer should have amended her tax code and provided the correct code for the deduction of tax. The Respondents submit that the onus is on the individual to contact HMRC to inform them of her salary in order for them to amend her code.

(8) The Appellant has been a higher rate taxpayer and has completed Self-Assessment returns since 1998-1999. She should have been aware that she was not paying enough tax due to her past experience and coding. HMRC say that the Appellant should be expected to be aware that a deadline for payment of tax was 31 January after the end of the tax year in question and of the consequences of not making payment on time.

(9) The taxpayer did not act in a way as someone who seriously intended to honour their tax liabilities and obligations and in the circumstances there is no reasonable excuse. The payment of tax 7 months after the initial calculation was issued is not a reasonable position and it is not inequitable that the taxpayer should have to pay penalties or interest charge.

Discussion and conclusion

(1) The PAYE system is a form of withholding income tax from payments of employment income. However, the primary method of collection of income tax arises under the self-assessment regime. It is possible, in some cases to collect underpayment of PAYE in subsequent periods by an adjustment to the employee's code. In other cases, an underpayment of tax must be collected through the self-assessment system.

The Appellant submits that an underpayment of tax has arisen as a result of HMRC's incompetence. They had all relevant information necessary for determining the correct PAYE code and had the completed P46 Form from her employer. There is no requirement for the employer to provide any information to HMRC about the level of salary being paid to the employee. The deductions working sheet mentioned in Regulation 49 is

for the use of the employer who is not required to send this sheet to HMRC.

(2) HMRC had the power to make any further enquiries to obtain any information which was not provided. The Tribunal accepts that no such enquiries were made.

(3) Regulation 50 confirms that if the employer operates the code determined in accordance with the PAYE Regulations it is to be treated as issued by HMRC.

(4) The Tribunal's finding is that although the PAYE Regulations resulted in the wrong coding that does not give the Appellant a reasonable excuse for the late payment of her tax. A reasonable excuse must exist throughout the period of default and this was not the case.

(5) At the relevant time, which is the time for the payment of the tax, the Appellant knew the amount of tax which had to be paid. It is accepted that she did not know the correct code earlier or at the start of her employment. This, however, did not impact on the payment of tax due by the due date. A reasonable excuse must exist throughout the period of default and there is no excuse for the period between the date the tax was due and the date it was paid. It was apparent to the Appellant, in spite of the wrong coding, that tax was underpaid. Notwithstanding, the Appellant still paid the tax due late. This delay in settling the tax to be paid under the self-assessment system deprives her of having a reasonable excuse.

(6) The period of default under S.59C TMA is the period beginning with the date on which the tax remains unpaid after the due date for payment and ending with the day before that on which the tax was paid.

(7) While the Tribunal accepts that the tax code was wrong and HMRC failed to discharge their duty under Regulation 14 it is clear that the Appellant knew of this position at lo the start of her employment. In her letter of 15 August 2013 to HMRC she stated that it was "patently apparent from the start of my employment … that based on my annual salary alone, the tax coding that was allocated to me was manifestly incorrect". It was incumbent on the taxpayer to approach HMRC to get the correct coding. This would have required disclosure of her salary and other income and adjustment made to her coding for the purposes of the deduction of tax. A taxpayer must check their coding and cannot abdicate responsibility for the accuracy of the notice of coding to HMRC. The Appellant has a responsibility to pay the unpaid tax pursuant to the self-assessment system and so has a residual duty to ensure the accuracy of all information held by HMRC.

(8) The taxpayer completed and submitted her returns for HMRC to do the calculations on her tax liability in October 2012. This meant that in September, when she would have done the calculations herself, she would

have been aware of her tax liability and certainly when HMRC had completed the task in October she definitely would have been aware of the liability to tax. She also knew that the tax was due on 31 January 2013 since it was common practise that she would allocate January to reviewing her tax affairs before the payment date. There seems no reason, why she should make her tax payments late. If she was unable to check her returns or salary details, a payment on account could be made to HMRC of the tax due under self-assessment. If it was necessary for her to check her payslips and other details with her employer to verify that the correct amount of tax had been deducted then this could have been done at a later date and no penalty would have arisen.

(9) The point is that at the relevant time which is at the date for the payment of tax she knew the amount of tax that had to be paid and she knew of the penalties for the non-payment of tax at that time. She also had the benefit of substantial sums paid to her which should have been deducted if her coding was correct.

(10) By her own admission, she knew her coding was wrong and tax was being deducted at the basic rate. She was registered under the Self-Assessment system, had been a higher rate taxpayer in the past and was familiar with the operation of tax system, PAYE and coding. This was not unfamiliar territory. In spite of this, the final tax payment was not made until May. In the circumstances, there cannot be a reasonable excuse where the taxpayer has failed to pay the tax without delay by the due date.

(11) There seems to be no reason why she should have delayed payment for such a long period. This is not the approach that would have been taken by a person who acted reasonably and wanted to honour their tax obligation. It is not a reasonable position.

3. In the circumstances the Tribunal find that there is no reasonable excuse and the late payment penalty should be upheld.

4. 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: 27 February 2014