

[2014] UKFTT 0756 (TC)



TC03875

Appeal number: TC/2014/00697

INCOME TAX - Penalties - late payment of PAYE and NICs - Schedule 56 Finance Act 2009 - whether reasonable excuse due to insufficiency of funds - no - whether reasonable excuse due to failure to warn - no - whether penalty unfair - no - whether penalty disproportionate - no.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

THE KNOLL CARE HOME LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE JOANNA LYONS
MR MICHAEL SHARP**

Sitting in public at Bedford Square on 26 June 2014

Mr Maninder Ghuman, managing director, acting in person, for the Appellant

Mr Mark Ratcliff, officer of HM Revenue and Customs, for the Respondents

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DECISION

Introduction

1. This is an appeal against a penalty of £3,192.59 imposed for the late payment of Pay as you earn (PAYE) tax and national insurance contributions (NIC) for the tax year ending 5 April 2012. The penalty was imposed in accordance with Paragraph 6 Schedule 56 Finance Act 2009 (“FA”).

The issues

2. The appellants appeal on the following grounds :-
- (1) There is a reasonable excuse due to an insufficiency of funds
 - (2) There is a reasonable excuse due to lack of awareness of the penalty regime.
 - (3) The penalty is unfair and disproportionate.

The Legislation

3. The legislation was not in dispute however the relevant provisions are set out below. In the paragraphs below the term PAYE is taken to mean both PAYE and NIC.

Liability for the penalty

4. Regulation 69 Income Tax (Pay as you earn) Regulations 2003 (SI 2003 No 2682) provides that an employer is required to pay monthly electronic PAYE payments within 17 days of the end of the tax period. In effect this means that the PAYE is due on 22nd of each month. Regulation 67 Social Security (Contributions) Regulations 2001 provides that NIC contributions are “paid recovered and accounted for in a like manner as income tax”.

5. Schedule 56 Finance Act 2009 (“FA”) introduced a new penalty regime for the late payment of tax including employer’s PAYE. Paragraph 1(1) provides that penalties are payable by a person “P” where P fails to pay an amount payable under the regulations by the due date. The penalties for late payment of PAYE are determined by paragraphs 6-8 Schedule 56.

6. The amount of the penalty is determined on a sliding scale depending upon the number of defaults and the total amount of the late payment. Paragraph 6(7) provides:

“If P makes 10 or more defaults during the tax year, P is liable to a penalty of 4% of the total amount of those defaults”.

7. Paragraph 6(3) provides that the first default in the tax year is not taken into account in calculating the number of defaults. The final default is not taken into

account in accordance with the decision in the case of *Agar Limited v HMRC [2011] UKFTT 773 (TC)*.

Reasonable excuse

8. A penalty may not be incurred if there is a reasonable excuse for the default.
5 Paragraph 16 Schedule 56 FA provides:

(1) Liability to a penalty ...does not arise in relation to a failure to make a payment if P satisfies HMRC or (on appeal) the first-tier Tribunal....that there is a reasonable excuse for the failure.

(2) For the purposes of sub-paragraph (1)

10 (a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control.

(b) where P relies upon any person to do anything, that is not a reasonable excuse unless P took reasonable steps to avoid the failure

Special circumstances

15 9. HMRC may cancel or reduce a penalty if they think it is right to do so due to special circumstances, Paragraph 9(1) Schedule 56 FA. The term "special circumstances" is not defined however it must be "something different from and wider than reasonable excuse" *Rodney Warren and Co v HMRC [2012] UKFTT 57 (TC)*. Special circumstances do not include the inability to pay, Paragraph 9(2)(a).

20 10. The Tribunal may reconsider the issue of special circumstances and cancel or reduce a penalty only if it is satisfied that the decision of HMRC was flawed. Paragraph 15(3)(b). In this context the term 'flawed' means flawed when considered in the light of the principles applicable in proceedings for judicial review, Paragraph 15 (4).

25 **The facts**

11. The Tribunal read the documents provided by both parties and heard oral evidence from Mr Ratcliff and Mr Ghuman. The evidence was not disputed and is summarised below.

The penalty

30 12. For the tax year 2011-12 the Knoll care home limited ("the company") were due to make monthly payments of employer's PAYE in accordance with the Regulations. Electronic payment was due on the 22nd day of each month and late payments were made in every calendar month for the tax year 2011-12. The period of late payment was between one and eleven days.

35 13. HMRC applied a late payment penalty in accordance with Paragraph 6 Schedule 56 FA. The penalty was calculated taking into account the number of defaults and the amount of the late payment. The first and final defaults were not taken into account in calculating the penalty in accordance with Paragraph 6(3) and *HMRC v Agar (above)*.

Accordingly there were 10 qualifying defaults and a penalty of 4% was applied in accordance with paragraph 6(7). The late payment amounted to £79,814.75 and the penalty applied was £3,192.59.

The business

5 14. The company operates as a residential home for the elderly in Yeovil. The building is owned by a separate company, Goodliff limited. Mr Ghuman is the managing director of both companies. The home caters for both Local authority and private residents.

10 15. The home experienced a downturn in occupancy levels from April 2011 caused by an increased death rate amongst its residents together with a block on referrals of new residents by the Local authority. The block on referrals was not disclosed to Mr Ghuman for several months and was not finally resolved until September 2011. Full occupancy resumed in September 2012. The company's turnover for the accounting period ending 30 November 2011 was £975,132 and this reduced to £777,489 for the
15 period ending 30 November 2012.

16. Mr Ghuman was directly involved in the management of the home between April and November 2011. In November 2011 he relocated to Berkshire and delegated the day to day running of the home to a manager. He accepted that there had been difficulties occasioned by the introduction of new record keeping procedures
20 at the home combined with management failures.

The late payments

17. On 22 April HMRC telephoned Mr Ghuman informing him that late payments of PAYE had been made and that penalties would be incurred in the event of further late payments. Mr Ghuman assumed that the penalty would be limited to a charge to
25 interest. HMRC sent a letter to Mr Ghuman advising him of the new penalty regime however this letter did not come to Mr Ghuman's attention.

18. Mr Ghuman states that the downturn in occupancy levels caused a significant cash flow problems as the company were reliant upon regular payments from the Local authority which were made in arrears. He injected some of his own capital into
30 the company but was unable to obtain to obtain a further mortgage via Goodliff limited as he was in dispute with his bank about an interest rate swap. He instructed his bookkeeper to pay the tax as soon as payments were received from the Local authority. He accepts that this resulted in late payments but states that this was a commercial decision on his part.

35 19. He accepts that he did not approach the Local authority to request earlier payment neither did he make a request of HMRC for time to pay the PAYE.

20. HMRC contacted the company bookkeeper in December 2011 to discuss the late payments and penalties. No time to pay arrangement was made and HMRC were informed that the late payment occurred due to an oversight. Mr Ghuman did not
40 provide evidence from his bookkeeper regarding the contents of this telephone call.

The arguments

The Appellant's case

21. Mr Ghuman submits that the late payments occurred due to an insufficiency of funds occasioned by the unexpected reduction in occupancy levels. He states that he
5 was not aware that such substantial penalties would be imposed for late payment.

22. He submits that the penalty is unfair and disproportionate in the circumstances as most of the payments were made only a few days late.

The Respondent's case

23. Mr Ratcliff submits that any insufficiency of funds occurred as a result of the
10 normal hazards of business and did not arise from circumstances outside the company's control. He also submits that Mr Ghuman did not act reasonably in that he did not make a request for time to pay.

24. Mr Ratcliff submits that the penalty regime has been widely publicised and specific warnings were given to the company by telephone and in writing. He states
15 that the penalty does not depend upon the length of the default and has been fairly imposed in accordance with the legislation.

Discussion

Reasonable excuse insufficiency of funds

25. Paragraph 16(2) FA provides that an insufficiency of funds may amount to a
20 reasonable excuse if it is attributable to events outside the taxpayer's control. We accept that there was a downturn in occupancy during the relevant period leading to cash flow difficulties as this evidence was not disputed. However we do not find that the insufficiency arose from events outside Mr Ghuman's control because he was responsible for the management failures which led to the reduction in occupancy and
25 he admits making to having made a commercial decision to delay payment.

26. In the event of cash flow difficulties it would have been reasonable for Mr Ghuman to have requested earlier payment from the Local authority and he accepts that he did not do so. In addition a reasonable taxpayer being aware of his responsibilities would have approached HMRC to ask for time to pay. Mr Ghuman
30 did not take this course despite having been warned of potential penalties.

Reasonable excuse – failure to warn

27. HMRC is under no statutory duty to warn the employer that they may be liable to a penalty for late payment of PAYE. In the case of *Rodney Warren and Co v HMRC [2012] UKFTT 57 (TC)* the First Tier Tribunal found that

35 “the obligation is to make payment: the lack of warning (or early assessment) is not an excuse for failing to make payment”.

28. We accept that Mr Ghuman did not receive HMRC's warning letter as he gave clear evidence on this issue. However Mr Ghuman accepted that he had been warned about the potential penalties but was merely unaware of their scale. In such circumstances it would have been reasonable for him to have made enquiries of HMRC regarding the nature of the penalty regime.

29. For these reasons we do not find that there is a reasonable excuse due a failure to warn of impending penalties.

Special circumstances

30. The Tribunal has the power to reconsider the issue of special circumstances if HMRC's decision is flawed, Paragraph 15(3) Schedule 56 FA. In this case HMRC have decided not to exercise their discretion to cancel or reduce this penalty due to special circumstances. We do not find that this amounts to a flawed decision because no additional circumstances have been advanced beyond the issue of reasonable excuse.

Fairness

31. In the case of the Commissioners for *Her Majesty's Revenue and Customs v Hok Limited [2012] UKUT 363 (TCC)*. The Tribunal said:-

"the first tier Tribunal has only that jurisdiction which has been conferred on it by statute and can go no further.[56]...It follows that in purporting to discharge the penalties on the ground that their imposition was unfair the Tribunal was acting in excess of it's jurisdiction".[58]

32. There is no statutory basis for an appeal against this penalty on the grounds of fairness. Accordingly this Tribunal has no jurisdiction to discharge the penalty on the ground that its imposition was unfair. In any event we do not find that the penalty has been unfairly imposed as Mr Ghuman was warned of the potential penalties but went on to make late payments in every month of the tax year.

Proportionality

33. In the case of *Dina Foods Limited v Revenue & Customs [2011] UKFTT 709 (TC)* the First Tier Tribunal considered the proportionality of penalties imposed under Paragraph 6 Schedule 56 FA. We respectfully agree with the following comments of Judge Berner :-

"any penalty may be perceived as harsh, we do not consider that the levying of the penalty in this case was plainly unfair. ...Although the size of penalty ...may seem harsh, the scheme of the legislation is in our view within the margin of appreciation afforded to the State in this respect. Accordingly we find that no Convention right has been infringed and the appeal cannot succeed on that basis." [42]

34. In the case of *HMRC v Total Technology Limited [2012] UKUT 418 (TCC)* the Upper Tribunal observed

5 “The State must be entitled to impose the penalty which it considers to be the most efficacious for achieving the aim pursued constrained only by the requirement that the penalty is not disproportionate to the gravity of the infringement. And here we would accept that, to use the words of the Convention jurisprudence, a wide margin of appreciation should be afforded to the state” [73]

10 35. We accept that the payments were made only a few days after the due date and that the penalty will have a substantial impact upon the profitability of the company. However we do not find the penalty to be unlawful or disproportionate in accordance with the principles set out in *Dina Foods Limited and Total Technology Limited (above)*. The penalty was correctly imposed in accordance with the legislation and was proportionate to the amount of the late payment and the number of defaults. Had the company made fewer late payments during the tax year the penalty would have been significantly reduced. For these reasons we find the penalty imposed to be
15 proportionate.

Decision

36. For the reasons given above, the Tribunal dismisses the appeal.

Rights of appeal

20 37. 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)”
25 which accompanies and forms part of this decision notice.

30 **JOANNA LYONS**
TRIBUNAL JUDGE

RELEASE DATE: 04 August 2014