TC02305

Appeal number: TC/2011/08652

TYPE OF TAX –PAYE –appeal against the penalty imposed for the late payment of PAYE- Schedule 56 Finance Act 2009- whether lack of specific warning was a reasonable excuse – no- appeal dismissed but penalty rate reduced in respect of one month as late payment due to technical fault at HMRC

FIRST-TIER TRIBUNAL
TAX CHAMBER

CORE TECHNOLOGY SYSTEMS (UK) LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE SANDY RADFORD
RICHARD THOMAS

Sitting in public at Bedford Square, London WC1B 3DN on 19 July 2012

Mr Akshay Shah for the Appellant

Ms Karen Evans for the Respondents

DECISION

1. This is an appeal against the penalty of £5,887.17 imposed for the late payment of PAYE by the appellant during tax year 2010/2011

The legislation

2. Penalties for the late payment of monthly PAYE amounts were first introduced for the tax year 2010/11. The legislation is contained in Schedule 56 to the Finance Act 2009 ("Schedule 56"). Schedule 56 covers penalties for non- and late payment of many taxes: paragraph 1(1) (which applies to all taxes) states that a penalty is payable where the taxpayer fails to pay the tax due on or before the due date.

3. Paragraph 6 (which relates only to employer taxes such as PAYE) states that the penalty due in such a case is based on the number of defaults in the tax year, though the first default is ignored. The amount of the penalty varies as provided by sub-paragraphs (4) to (7):

> (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.

In this and other paragraphs of Schedule 56 "P" means a person liable to make payments.

4. Under paragraph 11 of Schedule 56 HMRC is given no discretion over levying a penalty:

> 11(1) Where P is liable to a penalty under any paragraph of this Schedule HMRC must –
>
> (a) assess the penalty,
>
> (b) notify P, and
>
> (c) state in the notice the period in respect of which the penalty is assessed.
>
> (3) An assessment of a penalty under any paragraph of this Schedule—
>
> (a) is to be treated for procedural purposes in the same way as an assessment to tax (except in respect of a matter expressly provided for by this Schedule),
>
> (b) may be enforced as if it were an assessment to tax, and

(c) may be combined with an assessment to tax.

5. Paragraphs 13 to 15 of Schedule 56 deal with appeals. Paragraph 13(1) allows an appeal against the HMRC decision that a penalty is payable and paragraph 13(2) allows for an appeal against the amount of the penalty. Paragraph 15 provides the Tribunal's powers in relation to an appeal which is brought before it:

> (1) On an appeal under paragraph 13(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.
>
> (2) On an appeal under paragraph 13(2) that is notified to the tribunal, the tribunal may-
>
> (a) affirm HMRC's decision, or
>
> (b) substitute for HMRC's decision another decision that HMRC had the power to make.
>
> (3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 9-
>
> (a) to the same extent as HMRC…[…],or
>
> (b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 9 was flawed.

6. Paragraph 9 (referred to in paragraph 15) 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.

7. Paragraph 16 contains a defence of reasonable excuse, but an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control. Nor is it such an excuse where P relies on another person to do anything unless P took reasonable care to avoid the failure; and where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse has ceased.

Background and Facts

8. The appellant was assessed on 17 June 2011 to a penalty in the amount of £7,580.80 for the late payment of PAYE for the tax year 2010/2011. This was based on 11 defaults (all months apart from Month 12).

9. The appellant responded on 28 June 2011 claiming ignorance of the new penalty regime and pointing out that there was no statement of how the penalty had been calculated or what HMRC had taken as the date of payment. The letter also asked for the penalty to be waived or to be reduced to an amount proportionate to the length of the defaults. HMRC replied on 13 July 2011 that the "appeal" was invalid as it contained none of what HMRC say are the three valid grounds for making an appeal, but HMRC did supply details of the late payments and how the penalty had been calculated.

10. On 18 July 2011 the appellant pointed out what it claimed were a number of errors and discrepancies in HMRC's statement, in particular that HMRC has not used the due date for electronic payments which the appellant had made. It reiterated its claim that the penalty was unfair and disproportionate. It seems HMRC must have accepted that there was now a valid appeal because it considered whether the appellant had a reasonable excuse for its defaults and concluded that it did not.

11. On 15 August 2011 the appellant sought a review of the decision of HMRC to assess a penalty, pointing out in particular that the payment for Month 3 had not been made late but had been misposted by HMRC. On 30 September 2011 the review concluded that the penalty decision should be varied as errors in posting had been made by HMRC, and that there were only 8 relevant defaults (months 1, 2, 3, 4, 5, 6, 8, and 9), reducing the penalty calculation to £5887.17. As a default in month 1 is ignored and does not count towards the penalty this amounted to 7 defaults and a penalty rate of 3%.

12. On 26 October 2011 the appellant appealed to the Tribunal.

13. The appellant has a poor history of compliance which goes back to the 2003/04 tax year.

Appellant's submissions

14. Mr Shah who is the financial controller of the appellant submitted that if the appellant had been informed earlier of the potential penalty it would have realised the severity of the problem but it had not known until the end of the tax year. He submitted that HMRC should have immediately issued a penalty notice from Month 2 and then the appellant would have ensured that going forward there were no further defaults.

15. Mr Shah referred to the First-Tier Tribunal case of *Hok Limited v HMRC* [TC01286] in which Judge Geraint Jones QC stated that there was no logical reason why HMRC would delay four months before sending out a penalty notice and as an

arm of the state HMRC had a common law duty of fairness. Mr Shah submitted that the appellant's penalty was unfair particularly as he only worked part time.

16. He submitted that if the Tribunal checked it would see that the payments were not very late and the appellant had tried to pay on time.

17. He submitted that the appellant had never previously had any dispute with HMRC and that this was the first time.

18. He accepted that HMRC had called on various occasions and although he had returned the call all he had been told was that the payment was late with no mention of the penalty.

19. He also referred to two visits to the appellant's office from the distraint department at which immediate payment was demanded without an explanation of the consequences and penalties which arose from late payments.

20. He submitted that if a surcharge had been imposed earlier the appellant would have improved its payment record and since the penalty letter of 17 June 2011 the appellant had learnt its lesson and never defaulted again.

21. Finally he submitted that as the appellant's payment for month 3 in accordance with the appellant's bank statement was banked on 23 July 2010 – one day after the due date this should not count. If this month was ignored then there would only be 6 defaults which would reduce the penalty rate to 2% instead of 3%.

HMRC's Submissions

22. Ms Evans submitted that the *Hok* case related to the late filing of the P35 returns which incurred a penalty of £100 per month. This case related to default penalties the rate of which could only be determined at the year end when the total number of late payments made during the tax year could be determined. Before the end of the tax year this number could not be known.

23. She submitted that HMRC had given the new PAYE penalties wide publicity and referred to the Employers' bulletins of September 2009, April 2010 and August 2010 which were produced to the Tribunal. She also submitted that HMRC had tried on several occasions to speak to the appellant with respect to the penalties which they were incurring and transcripts of the call were produced to the Tribunal.

24. Ms Evans confirmed that HMRC had considered whether there were special circumstances in accordance with paragraph 9 of the Schedule such that the penalty should be reduced but had found none.

25. However she said that in considering whether the appellant had a reasonable excuse HMRC had since reduced the penalty for month 3 because the payment had not in fact been late and the problem had been caused by a technical fault at HMRC. This counted as a reasonable excuse.

26. Otherwise she submitted that the penalty had been imposed in accordance with the legislation.

Findings

27. We found that the appellant had a record of late PAYE payments and that the new penalty regime was well publicised by HMRC, and that the appellant would have been sent a penalty warning letter early in the tax year 2010/11. We found therefore that a responsible employer should have been well aware of the likely effect of making late PAYE payments.

28. We found that the legislation is clear. If a PAYE payment is made late even by one day then in accordance with paragraph 11 of the Schedule HMRC must impose a penalty the rate of which is dictated by the number of late PAYE payments.

29. We did not consider that any failure on the part of HMRC to issue a specific warning to the appellant could amount to either special circumstances or a reasonable excuse. HMRC had made several attempts to speak to the appellant and remind them that the payments were late.

30. HMRC had considered whether there were special circumstances and found none. They had however reduced the penalty for month 3 due to the technical fault with they deemed a reasonable excuse.

31. We examined the case of *Hok* but found that in this matter it was not possible to calculate the penalty until the end of the tax year and so a penalty notice could not have been issued after month 2 as submitted by the appellant. In the legislation considered in *Hok*, a separate penalty arose for each month following a single failure to make a return until the return was submitted, and the Tribunal considered it unfair that no notification was made to the appellant until at least 4 penalties had been incurred[1]. But in any event we hold that HMRC did notify the appellant of its vulnerability to penalties shortly after the first default.

32. For the above reasons we found that the appellant's appeal, so far as it was under paragraph 13(1) of Schedule 56 (that a penalty was not due) could not succeed.

33. However in accordance with Mr Shah's submission regarding month 3 we found that HMRC had accepted that the late payment was as a result of their technical fault and that there was no default, so we found that the penalty rate should be reduced to 2%, the rate applicable to 6 defaults. We would add that we do not think it

[1] It is possible, as the Tribunal pointed out to Ms Evans, that a penalty assessment could be made "in year" followed up if necessary by one or more supplementary assessments, as set out in paragraph 11(5) of Schedule 56. HMRC's Compliance Handbook at paragraph 152100 confirms this, saying "We normally assess the penalties after the end of the tax year but if necessary we can assess them during the year." and the Handbook goes on to give examples of how to calculate "in year" penalties. We would not, however, expect HMRC to operate an "in year" assessment basis routinely as clearly Parliament has imposed a single penalty finally calculable only after the year end, and this still makes the case very different from that in Hok.

is correct for HMRC to characterise what happened in Month 3 as giving the appellant a reasonable excuse for its default: if HMRC accept it cannot show that the payment was late, then there is no default requiring any excuse.

Decision

34. The appeal, so far as it is made under paragraph 13(1) of Schedule 56 (liability to a penalty), is dismissed. The appeal, so far as it is made under paragraph 13(2) of Schedule 56 (amount of the penalty), is upheld and HMRC's decision (as expressed in its assessment) is varied in accordance with paragraph 15(2) of Schedule 56 to the extent that there were only 6 defaults rather than the 11 assumed by HMRC in making its assessment. The penalty rate is reduced to 2% calculated on the tax paid late in relation to only 6 defaults, £4010.42.

35. 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.

SANDY RADFORD
TRIBUNAL JUDGE

RELEASE DATE: 8 October 2012