



TC02388

Appeal number: TC/2012/05513

*Income tax– PAYE penalties- reasonable excuse – time to pay arrangements
–no formal arrangement in place –taxpayer’s genuine belief that
arrangement existed – appeal allowed in part.*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

CORNWALLIS CARE SERVICES LTD

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE RACHEL SHORT
DR MICHAEL JAMES**

Sitting in public at Pydar Street, Pyder House Truro on 20 August 2012

Mr Charles Barclay for the Appellant

Ms Karen Evans, Officer of HM Revenue and Customs, for the Respondents

DECISION

5 1. This is an appeal against PAYE penalties under paragraph 6 of Schedule 56 Finance Act 2009 in respect of the 2010 -11 tax year amounting to £4,753.67 payable by Cornwallis Care Services Limited (“Cornwallis”).

2. The penalties relate to six periods of default; Period 2, (period to 5th June 2010), Period 5 (period to 5th Sept 2010), Period 8 (period to 5th December 2010), Period 9
10 (period to 5th January 2011) Period 10 (period to 5th February 2011) and Period 11 (period to 5th March 2011).

The Law

3. Paragraph 6 of Schedule 56 Finance Act 2009 sets out the penalties which are
15 chargeable in respect of failure to pay PAYE on or before the date when it is due and payable. The level of the penalty is dependant on the number of defaults during a tax year: the first failure in a tax year does not trigger a penalty (paragraph 6(3)), 1, 2 or 3 defaults carry a penalty of 1% of the tax due, (paragraph 6(4)), 4, 5 or 6 defaults carry a penalty of 2% of the total tax due (paragraph 6(5)).

20 4. These penalties cannot be applied during a period when there is an agreement for deferred payment between HMRC and the taxpayer (paragraph 10(1)). There is no liability for a penalty if the taxpayer can satisfy the Tribunal that there is a “reasonable excuse” for the failure to make the payment on time (paragraph 16(1)).

The Facts

25 5. On behalf of Cornwallis, Mr Barclay explained that Cornwallis ran four care homes in Cornwall and employed 100 people.

6. Cornwallis had faced financial difficulties during 2010 and had imposed a rolling programme of cost cutting. During this time they were under financial
30 pressure from their bankers and were slow in paying their PAYE.

7. Mr Barclay explained that one of the reasons for his financial difficulties was as a result of cash flow shortages caused by the delay in receiving payment for patient admissions from Cornwall Council, who could be up to nine months late in making payment. Payments from Cornwall Council made up about one twelfth of the
35 company’s total income.

8. Mr Barclay had had a number of meetings with his local tax inspector, Mr Youngs in June or July 2010, where they had come to an oral agreement for a

deferred schedule of PAYE payments for the following six months. There was no written evidence of this agreement and Mr Barclay accepted that not all of the payments for the next six months were made in accordance with the agreed deferred schedule.

- 5 9. Mr Barclay was not aware that any PAYE penalties had been incurred until he received a letter from HMRC on 17 October 2011. Mr Barclay responded to this letter and as a result the penalties were reduced initially to £8,944.35 (HMRC letter of 15 November 2011 removing Period 7 from the calculations) and then to £4,753.67 (HMRC letter of 26 April 2011, removing Period 12 from the calculations)

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The Arguments

10. For HMRC, Ms Evans said that there was no written evidence of a time to pay agreement between HMRC and Cornwallis for the months in question, save in respect of Periods 3 and 4 (referred to at folio 2 of HMRC's bundle of documents) and these
15 had already been removed from the penalty calculation. This was on the basis of HMRC's notes of a conversation with Mr Barclay on 24th June 2010 (evidenced at folio 50 of HMRC's bundle). There was no evidence in HMRC's transcripts of phone conversations between Cornwallis and Mr Youngs of any formal time to pay arrangements being in place in respect of any other periods.

- 20 11. HMRC stated that there could be no formal time to pay arrangement for Period 2 (June 2010) because, according to their records, the only conversations with Mr Youngs occurred on 24 June, after the 19 June due date for that period. Time to pay arrangements had to be made prior to the due date for payment in order to be effective.

- 25 12. Mrs Evans accepted that Mr Barclay had not been notified by Mr Youngs of the penalties which were being incurred and that it might have made a difference to Cornwallis' position had this been mentioned.

- 30 13. HMRC pointed out that Mr Barclay should have been aware of the penalties which applied for late PAYE payments and it was the taxpayer's obligation to ensure that they were aware of the rules and to pay the tax on time.

- 35 14. For Cornwallis, Mr Barclay explained that he believed that he had an agreement with HMRC on the basis of a number of conversations which he had with Mr Youngs which he had attempted to comply with in respect of the PAYE payments and, other than the letter which was received in October 2011, he had no reason to believe that this agreement was not accepted by HMRC.

15. Mr Barclay believed that his conversations with Mr Youngs in June and July covered the payments due for June to September. In particular his agreement with Mr Youngs allowed him to defer payments for September (Period 5) until November.

16. Mr Barclay referred to the cash flow problems suffered by the business as a result of late payment by Cornwall Council, but did not suggest that these were particularly acute or unexpected for the periods under appeal.

Decision

5 17. Having heard Mr Barclay's evidence and having considered the documents provided by HMRC, including the records of conversations with Mr Barclay and the schedule of late PAYE payments for 2010 – 2011, the Tribunal concluded that Cornwallis' late payments for the periods referred to at Folio 2 as Period 2 (payment date 19 June) and Period 5 (payment date 19 September) were as a result of Mr
10 Barclay's genuine belief that he had a deferred payment agreement with HMRC based on his conversations with Mr Youngs in June and July 2010.

18. In the Tribunal's view HMRC themselves were not clear about the terms which had been agreed with Cornwallis or which payments received from the taxpayer should be allocated to which periods; HMRC's transcript of 12.10.10 records that
15 "this is a mess".

19. In these circumstances, Cornwallis' genuine belief that they had been given time to pay in respect of their June and September payments should be treated as a "reasonable excuse" under paragraph 16 (1) Schedule 56 Finance Act 2009.

20. There is no statutory definition of what constitutes a "reasonable excuse" for these purposes, although paragraph 16(2) of Schedule 56 does state that neither an insufficiency of funds nor reliance on a third party should be treated as a reasonable excuse. HMRC's own guidance says that a reasonable excuse is "an unexpected or unusual event, either unforeseeable or beyond the taxpayer's control". We consider that HMRC's guidance gives a relatively restrictive interpretation of the legislation
25 and that there are other types of circumstance which should be treated as giving rise to a reasonable excuse.

21. Previous decisions of this Tribunal have concluded that in some circumstances reliance on information or guidance from HMRC which turns out to be misleading, can constitute a reasonable excuse. (See for example *Dental I.T Ltd* (TC 1002) &
30 *Tower Leasing* (TC 1334) We consider that this is the case for Cornwallis in respect of the periods of default which were discussed with Mr Youngs in June and July.

22. We have considered whether the cash flow difficulties faced by Cornwallis should also be taken account of in determining whether there is a reasonable excuse for any of the periods of default on the basis of the decision in *Stepto*, ([1991] STC
35 302) but in this instance consider that the regular pattern of late payments by Cornwall Council mean that these late payments cannot be treated as "unforeseen events" which a reasonable taxpayer would have had no means of anticipating.

23. We have therefore concluded that Cornwallis should not be treated as in default for Periods 2 and 5. As a result, the Tribunal directs in accordance with paragraph
40 15(2) of Finance Act 2009, that Period 1 should be treated as Cornwallis' first period of default for the 2010 – 11 tax year under paragraph 6(3) and the 2% penalty rate

should be applied to the remaining four periods, 8, 9 10 and 11 in accordance with paragraph 6(5) of Schedule 56 of Finance Act 2009 resulting in a reduced penalty of £3,572 remaining payable by Cornwallis.

5 24. 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
10 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

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**RACHEL SHORT
TRIBUNAL JUDGE**

RELEASE DATE: 27 November 2012

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