



**TC02579**

**Appeal number: TC/2012/07971**

*PAYE – appeal against the penalty imposed for the late payment of PAYE-  
Schedule 56 Finance Act 2009- appellant had a genuine belief that  
following an unexpected financial loss it had an arrangement with HMRC  
that it could pay its PAYE as and when it received its VAT repayments –  
appeal allowed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**NAP ANGLIA LIMITED**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE SANDY RADFORD  
HELEN MYERSCOUGH ACA**

**Sitting in public at Norwich on 27 November 2012**

**Mr Arnold, director of the Appellant**

**Mr Reeve, officer of HMRC, for the Respondents**

## DECISION

1. This is an appeal against the penalty of £1,950.83 imposed for the late payment  
5 of PAYE for every month of the tax year 2010/11.

2. The first month did not count as a default and month 12 was not charged as a result of the *Agar* case.

### The legislation

3. Penalties for the late payment of monthly PAYE amounts were first introduced  
10 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.

4. Paragraph 6 (which relates only to employer taxes such as PAYE) states that the  
15 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 subparagraphs (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.

20 (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.

25 (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.

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

30 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.

35 (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 6. 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:

10 (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.

15 (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.

20 7. 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.

25 (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.

30 8. 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**

5 9. Mr Arnold explained that the appellant's problems had started in 2007 when one of the appellant's customers went bust owing the appellant some £300,000.

10. The appellant informed HMRC that it would continue paying the current PAYE but would need to pay off the outstanding PAYE over a period of time.

10 11. Subsequently the appellant obtained a new contract for work on a listed building which meant that the bulk of the work would attract a VAT repayment. It therefore agreed with HMRC that the VAT repayment should be sent by the VAT office direct to the PAYE office to meet its PAYE obligations.

12. On 30 April 2010 the appellant received £3,000 from the VAT office. On enquiring what this money was for the appellant was informed that it was the balance after all the PAYE was settled.

15 13. Having settled the appellant's outstanding PAYE, Mr Arnold explained that he spoke to Mr Ireland at HMRC and asked that the appellant's agreement continue whereby its PAYE would be paid when it received the VAT repayment. The PAYE was due on the 19th of each month and the VAT repayment was usually received during the first week of the month.

20 14. For the rest of the tax year the appellant assumed that this agreement with HMRC would continue and that it would remain acceptable for the appellant to pay its PAYE once it received the VAT repayment.

25 15. Mr Arnold explained that this was the only way that the appellant could pay its PAYE and it had taken over 5 years for the appellant to finally settle all its debts. Even one creditor suing for its debt would have bankrupted the appellant.

16. Mr Arnold stated that the appellant had continued to pursue its large debtor hoping to receive funds by way of a court settlement. However the trial was continually delayed, the debtor had changed its barrister three times and in the meantime the debtor continued to sell its assets.

### **30 HMRC's submissions**

17. Mr Reeve submitted that there was no such agreement in place for the 2010/11 tax year. If such arrangement had been in place then there would have been no need for HMRC to have phoned the appellant every month to ask when the PAYE payment would be made.

35 18. Mr Reeve submitted that Mr Arnold had neglected to inform HMRC about the arrangement when they called.

19. Additionally a number of reminder letters had been sent to the appellant.

20. Whilst he accepted that for a time it was agreed by HMRC that the VAT repayments would be sent directly by the VAT office to meet the PAYE liability, he submitted that once the VAT repayments were sent directly to the appellant the agreement had ended and the appellant was expected to pay the PAYE on time every month.

21. Mr Reeve submitted that Mr Ireland worked in the debt collection department of HMRC and would not have been able to agree such an arrangement.

### **Appellant's submissions**

22. Mr Arnold submitted that even after the agreement started back in 2008 he was receiving calls and letters from HMRC asking when the payment would be made and so he was used to ignoring them.

23. He submitted that during the tax year HMRC had come round to collect the PAYE cheque and had made phone calls from the appellant's office to confirm that the agreement was still in place.

24. He submitted that although HMRC might have tried to speak to him on the telephone previously, it was only on 30 November 2010 that HMRC finally spoke to him. When he finally spoke to HMRC on the telephone he had told them about the arrangement the appellant had in place to pay its PAYE once the VAT repayment was received.

### **Findings**

25. We found that the appellant genuinely believed that it had an agreement with HMRC that it was acceptable to pay its PAYE only once its VAT repayment was received.

26. We found that the appellant had incurred considerable debt as a result of the failure of one of its customers to pay its bill but had acted competently and reasonably in the circumstances in order to deal with the situation.

27. The appellant claimed from the start that once its PAYE debt had been settled by the VAT office paying its VAT repayments directly to the PAYE office, Mr Ireland of HMRC had agreed that it would be acceptable for the PAYE payments to be delayed until the VAT repayment was received each month.

28. We found that although the appellant had no proof of this it was unlikely that absent its belief in this arrangement, it would not have made other arrangements.

29. We found that as a result of its financial problems the appellant needed its VAT repayment in order to pay its PAYE and it had a genuine belief that HMRC was aware of this and accepted the arrangement.

30. We found that as a result of its financial problems the appellant had no option but to make an arrangement with HMRC to pay its PAYE and it believed that it had done so.

5 31. We found that this genuine belief was a reasonable excuse for the late payments of the PAYE.

**Decision**

32. The appeal is allowed and the penalty is cancelled.

10 33. 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.

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**SANDY RADFORD  
TRIBUNAL JUDGE**

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**RELEASE DATE: 5 March 2013**