



**TC03009**

**Appeal number: TC/2013/04737**

*TYPE OF TAX – PAYE – late payment of monthly PAYE – whether payments made late – Yes. Whether scale of penalty is reasonable, and whether penalty is unfair and should be reduced - Decision of Upper Tribunal in Hok Ltd applies. Whether reasonable excuse, yes for one payment, whether Special reduction should apply - No. Appeal allowed in part*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**TBD MORRIS ENVIRONMENTAL LIMITED                      Appellant**

**- and -**

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

**TRIBUNAL: PRESIDING MEMBER  
PETER R. SHEPPARD FCIS FCIB CTA  
AIIT**

**The Tribunal determined the appeal on 4 October 2013 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 16 July 2013, and HMRC’s undated Statement of Case received on 28 August 2013 with enclosures. The Tribunal wrote to the Appellant on 28 August 2013 indicating that if they wished to reply to HMRC’s Statement of Case they should do so within 30 days. A reply dated 5 September 2013 was received and also considered by the Tribunal**

## DECISION

### 1. Introduction

5 This considers an appeal against a penalty initially of £2,639.70 but subsequently reduced to £1,727.26 levied by the respondents for the late payment of PAYE by the appellant for seven months in the tax year 2011-2012.

### 2. Legislation

Finance Act 2009 Schedule 56

The Finance (No.3) Act 2010 part 3 paragraph 27 and Schedule 11

10 The Finance (No.3) Act 2010, Schedule 11 (Appointed Day) Order 2011(S.I. 2011/132)

The Finance Act 2009, Schedule 56 (Appointed Day) and Consequential Provisions) Order 2010 (S.I. 2010/466)

15 The Finance (No. 3) Act 2010, Schedules 10 and 11 (Income Tax Self Assessment and Pension Schemes)(Appointed Days Order 2011 S.I. 2011/703

The Finance Act 2009, Schedules 55 and 56 (Income Tax Self Assessment and Pension Schemes)(Appointed Days) and Consequential and Savings Provisions) Order 2011 (S.I. 2011/702)

20 The Income Tax (Pay As You Earn) Regulations 2003 S.I.No.2682 of 2003 regulation 69

The Social Security (Contributions) Regulations 2001 S.I..No 1004 of 2001 regulation 67

### 3. Case law

25 HMRC v Hok Ltd. [2012] UKUT 363 (TCC)

Rogers Concrete Ltd. V HMRC [2012] UKFTT (482 (TC)

Xtreme Business Solutions Ltd v HMRC [2012] UKFTT 230 (TC)

### 4. Facts

30 The Finance Act 2009 Schedule 56 provides for penalties to be levied when a person fails to submit PAYE payments by the due date.

In respect of the year 2011-2012 HMRC consider that the appellant failed to make monthly payments on time on a number of occasions. On 18 March 2013 HMRC wrote to the appellant notifying a penalty of £2,908.81 and enclosing a detailed calculation of that amount. Unfortunately the details referred to an entirely unrelated trader. On 25 April 2013 HMRC sent the appellant a correct Penalty notice for late payment of PAYE. This charged a penalty of £1,727.26 for seven late payments during the tax year 2011-2012.

5. In a letter to HMRC and in the Notice of Appeal the appellant makes the following points:

40 a) The appellant asserts that all of the payments were sent by post three to six days ahead of the due date.

b) HMRC have made numerous mistakes in this case including sending the appellant penalty documentation relating to another trader and accusing the appellant of not making a payment of £9,105 which he had in fact made.

5 6. Copies of the cheques used to make payment were included in the bundle of papers reviewed by the Tribunal

<b>Tax period ended</b>	<b>Amount</b>	<b>Date payment received as asserted by HMRC</b>	<b>Tribunal's Observations</b>
5 May 2011	£9,020.24	27 May 2011	Photocopy of cheque dated 20 May 2011 in papers yet HMRC state the amount not paid on time as nil
5 June 2011	£8,970.52	23 June 2011	Photocopy of cheque dated 16 June 2011 in papers
5 July 2011	£10,012.83	23 July 2011	Photocopy of cheque dated 20 July 2011 in papers
5 August 2011	£8,840.87	23 August 2011	Photocopy of cheque dated 16 August 2011 in papers but the bank giro credit is dated 20 August 2011
5 September 2011	£8,677.75	28 September 2011	Photocopy of cheque dated 16 September 2011 in papers.
5 October 2011	£10,395.00	15 October 2011	Photocopy of cheque dated 13 October 2011 in papers. Accepted by HMRC as received on time.
5 November 2011	£7,817.78	19 November 2011	Photocopy of cheque dated 10 November 2011 in papers. Accepted by HMRC as received on time.
5 December 2011	£9,040.46	31 December 2011	Photocopy of cheque dated 13 December 2011 in papers

5 January 2012	£6,433.58	21 January 2012	Photocopy of cheque dated 18 January 2012 in papers.
5 February 2012	£6,882.28	27 February 2012	Paid electronically on 27 February 2012.
5 March 2012	£7,245.03	21 March 2012	Photocopy of cheque dated 15 March 2012 in papers.

Analysis of this table shows that in the eleven periods

- 5 i) Three payments (May, October and November 2011) have been accepted by HMRC as being made on time. The Tribunal notes conflicting statements by HMRC in respect of the payment due by 19 May. They say this was received on 27 May 2011 but also say the amount unpaid at 19 May was nil and have calculated the penalty as if the latter statement is correct. On review HMRC noticed this anomaly but decided not to make any amendment.
- 10 ii) One of the remaining payments (July 2011) was made by a cheque dated after the due date so it is unlikely that it could be credited to HMRC's bank account by the due date.
- iii) One of the payments (August 2011) was apparently made using a bank giro credit dated after the due date
- 15 iv) One of the payments was made electronically on 27 Feb 2012 and was late.
- v) In respect of four of the remaining payments the dates on the cheques are Thursday 16 June 2011, Friday 16 September 2011; Wednesday 18 January 2012 and Thursday 15 March 2012. Three of those payments were sent by post near to a weekend leaving little margin for error and it can be no surprise that HMRC assert the cheques were not received until after the due date. The cheque dated 18 January 2012 assumed delivery the next day which is not guaranteed by the post office.
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- vi) This leaves the payment due by 19 December 2011 which the Tribunal comments on later at paragraph 15.
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7. HMRC say eight payments were not received by them on the due date except for the three payments indicated as being received on time.

8. In respect of point 5 (a) HMRC say that there is evidence to show that cheques are not always posted 3 to six days before the due date for example HMRC points to 3 occasions in the table above where the cheque or bank giro credit are dated after the due date. They also say that in a conversation with a director on 23 September 2011 a director advised them that an electronic payment had been made on 21 September
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2011. The appellant actually paid by cheque dated 16 September 2011 but this was not received by HMRC until 28 September 2011.

9. In respect of point 5 b) HMRC say they have rectified the errors.

5 10. HMRC also provide evidence of notifications written and verbal made to the appellant during the period.

11. HMRC submit that the amount of the penalties have been calculated in accordance with legislation.

12. Tribunal's Comments.

10 In respect of the appellants assertion that all cheques were posted three to six days before the due date the Tribunal notes that the dates on two of those cheques and on a bank giro credit are later than the appellant's assertion of the date of posting. It is clear that other cheques were posted too close to the due date to be certain of receipt on time by HMRC especially where a weekend intervened. Neither the appellant nor  
15 HMRC have produced bank statements to show the dates the amounts were debited and credited to their respective bank accounts. The appellant has provided no evidence of posting cheques or any copies of bank transfer documents.

13. The level of the penalty; and whether the respondent's failure to send prompt reminders was unfair; are covered in the decision of the Upper Tribunal in the case of Hok Ltd. That decision also considers whether the jurisdiction of the First-tier  
20 Tribunal includes the ability to discharge a penalty on the grounds of unfairness. At Paragraph 36 of that decision it states "...the statutory provision relevant here, namely TMA s 100b, permits the tribunal to set aside a penalty which has not in fact been incurred, or to correct a penalty which has been incurred but has been imposed in an incorrect amount, but it goes no further. ...it is plain that the First-tier Tribunal has no  
25 *statutory* power to discharge, or adjust a penalty because of a perception that it is unfair."

14. The level of the penalties has been laid down by parliament. The only other consideration that falls within the jurisdiction of the First-tier Tribunal is whether or not the appellant has reasonable excuse for his failure as contemplated by The  
30 Finance Act 2009 Schedule 56 paragraph 16.

15. The payment due by 19 December 2011 creates something of a dilemma. The cheque is dated 13 December and if posted that day should have reached HMRC well within the deadline even allowing for delays in the Christmas post. It would have been within the post three to six days in advance guideline given by HMRC. HMRC  
35 say they received the payment on 31 December 2011, a Saturday and New Year's Eve, they also say they processed it on 3 January 2013. The appellant accepts the cheque did not get debited to its bank account until 5 January 2013. The fact that HMRC initially allocated the cheque against the wrong month on the appellant's record adds to the confusion. The Tribunal notes that the cheque dated 13 October  
40 2011 was received by HMRC on time on 15 October. If the cheque was posted on 13 December then for HMRC not to receive it until after the due date and as late as 31 December can only be attributed to a much longer than expected delay created by the volume of post at Christmas. The Tribunal has decided to give the benefit of the doubt

to the appellant and accepts that in the absence of evidence to the contrary this unexpectedly long delay establishes a reasonable excuse for the late payment due on 19 December 2011.

5 16. HMRC are rightly criticised by the appellant for the many errors they made. The Tribunal finds it most regrettable that details of a penalty due by another taxpayer was sent to the appellant. It is unfortunate that the appellant had to take time to prove that a payment HMRC said was not paid actually had been paid. However these problems cannot be considered as a creating a reasonable excuse for all the late payments made by the appellant.

10 17. The Finance Act 2009 Schedule 56 paragraph 16 provides that a penalty for a period may be set aside if the appellant has reasonable excuse for the failure. The Tribunal has decided that the appellant has established a reasonable excuse for one of the late PAYE payments leaving 6 late payments for which there is no reasonable excuse. The appeal is therefore allowed to that extent and the penalty falls to be  
15 reduced accordingly.

18. No penalty is levied for the first default. In accordance with The Finance Act 2009 Schedule 56 paragraph 6 (6) the following six defaults give rise to a penalty rate of 2% levied on the tax due on those defaults. The tax due on the six defaults totals £48,535.10. Therefore the penalty is 2% of £48,535.10 which is £970.70.

20 19. Paragraph 9 of Schedule 56 of the Finance Act 2009 (Special Reduction) provides HMRC with discretion to reduce any penalty if they think it right to do so because of special circumstances. On the information held in this case HMRC did not consider there were any special circumstances which would allow them to reduce the penalty. The Tribunal sees no reason to disagree with that decision.

25 20. 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  
30 "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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**PETER R. SHEPPARD**  
**TRIBUNAL PRESIDING MEMBER**

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**RELEASE DATE: 24 October 2013**