TC03198

Appeal number: TC/2012/00034

Penalties – late submission of PAYE and National Insurance Contributions – were the payments submitted in such time to have reached HMRC by the due date – no – did the Appellant have a reasonable excuse – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

SWIFT FIRE & SECURITY (SOUTHERN) LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE LADY JUDITH MITTING
ALAN SPIER

Sitting in Manchester on 3 December 2013

Mr Andrew Davies, Finance Director, for the Appellant

Mr Bryan Morgan, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The Appellant was appealing against a penalty charged under Schedule 56 Finance Act 2009 for the late payment of PAYE and National Insurance Contributions during the tax year 2010-11. The penalty was in the original sum of £18,082.62, later reduced to £13,053.91.

2. The Respondents produced the following schedule of payments made:

Month	Period – from and to	Payment due date	Date cheque received	Amount paid	Number of days late
1	6/4/10 to 5/5/10	19 May 2010	5 June 2010	£54,046.18	17
2	6/5/10 to 5/6/10	19 June 2010	25 June 2010	£50,451.33	6
3	6/6/10 to 5/7/10	19 July 2010	29 July 2010	£48,624.11	10
4	6/7/10 to 5/8/10	19 August 2010	25 August 2010	£48,332.39	6
5	6/8/10 to 5/9/10	19 September 2010	28 September 2010	£50,187.88	9
6	6/9/10 to 5/10/10	19 October 2010	23 October 2010	£40,649.63	4
7	6/10/10 to 5/11/10	19 November 2010	19 November 2010	£56,909.32	0
8	6/11/10 to 5/12/10	19 December 2010	24 December 2010	£52,007.54	5
9	6/12/10 to 5/1/11	19 January 2011	28 January 2011	£52,618.52	9
19	6/1/11 to 5/2/11	19 February 2011	24 February 2011	£41,764.97	5
11	6/2/11 to 5/3/11	19 March 2011	23 March 2011	£50,494.11	4

The dates of receipt of the monthly payment cheques had been taken from the Respondents' Brocs computer record.

3. Mr Morgan referred us to a number of points of contact between the Respondents and the Appellant Company during the course of the year, details of which had, again, been taken from the Respondents' computerised records. The records show that on 28 May 2010 and again on 27 September 2010, a P101 letter was sent by post to the company. This is a standard form letter, warning the recipient that certain of its PAYE payments had not been made on time and that if there was more than one late payment in a year there could be a liability to a penalty. The Respondents do not keep copies of such letters sent to out to individual employers but we were referred to a generic copy and to the computerised record of the letters having been sent to the Appellant. The letter also provides a number of reference points to which an employer can go for further advice.

4. In addition to the letter a total of seven phone calls were recorded on the following dates:

25th May
24th June
25th June (2)
25th August
24th September
24th December

Of particular note are the two on 25 June with a Lesley Dinsmore of the Appellant's accounts department. In the first of these two calls, the record shows that a warning of legal action was given. In the second, Mrs Dinsmore is recorded as advising that payment had been made on 23 June (it will be noted that this is consistent with the recorded date of receipt of the cheque of 25 June). On 25 August, a further call records Mrs Dinsmore as promising payment that day. (It will be noted that this promise would not be consistent if all cheques were posted as the August payment was received on the 25th). On 24 September, a message was left with an employee of the Appellant who agreed to ask a director to call back by the 27th. (No call was in fact received but it will be noted that the September cheque was received on the 28th.)

5. We were also referred by Mr Morgan to the plethora of publicity and information sent out to employers in advance of the new penalty regime coming into force. These included budget releases, employer packs containing a CD Rom, flyers, fact sheets and several issues of the Employer's Bulletin.

6. On behalf of the Appellant, we heard oral evidence form Mr Andrew Nichols, the Company's accountant whose task it was to make the monthly PAYE payments. He would personally write the cheques, dating them the day he made them out, and have then signed and countersigned by two of the directors. It was not always possible to secure both signatures on that day and occasionally it would be the following day but, we were told, never later than that. As soon as the cheques were signed they would go straight out in the post first class. The company is large, has a huge amount of outgoing post and it would be too unwieldy and impractical for any record of postage to be kept. Copy cheques were produced to us and bear the following dates:

16th May
16th June
16th July
16th August
10th September
18th October
11th November
7th December
13th January
18th February
11th March

7. Mr Nichols denied ever having received the employer information. He had been unaware of the penalty regime until the penalty notice was received. Equally he was not aware of the fact that his cheques were arriving late. He had at no time been told of the phone calls from HMRC. He was asked by the Tribunal if he accepted the Respondents' computerised record of the dates on which the cheques had been received to which he replied that he could not as it had been 3½ years previously. Mr Nichols also made the further point that the Respondents' log of calls did show that in seven of the defaulting months, the Respondents did not attempt to alert the company to the default.

Submissions

8. On behalf of the Appellant, Mr Davies' principal submissions were that the penalty was disproportionate and unfair, the company had not been sufficiently notified of the fact that its cheques were not being received on time and that there had been no warning of the escalation of the penalties.

9. On receipt of the bundle of documents for this hearing, Mr Davies had made enquiries of Mrs Dinsmore but she had no recollection of receiving the recorded phone calls. He also pointed out that Mrs Dinsmore would never have promised payment (reference phone conversation 25th August) as she herself was not a cheque signatory and could therefore never guarantee that a signatory could be found and the payment actually made on the day in question.

10. Mr Davies pointed out that the Respondents had only produced a generic copy of the warning letter and no proof that it had been properly addressed or indeed sent out at all. He had made enquiries within the office but no one had any recollection of the letters having been received. He could not comment personally on whether the recorded dates of receipt of the cheques were accurate.

11. Whilst accepting that some of the calls had to have been made, he pointed out that none of them warned that the penalties were escalating with each delayed payment. Had the company known of this they would have done something about it.

12. Although the company had no proof of postage of the letters, it was the company's case that they were all sent out in such time as it would have been reasonable to expect they would have been received by the 19th of the month. We were referred to the case of *Browns CTP Limited v HMRC* [2012] UKFTT 566. In this case there were five late payments all by between 3 and 5 days. The Tribunal considered that postal delays could give rise to a reasonable excuse depending on the circumstances and that there had been a general deterioration in deliveries and that this was an appropriate factor to take into account. What was important, said the Tribunal, was the reasonable expectation of the taxpayer when making payment and as the taxpayer should be entitled to rely on next day delivery by first class post, the appeal would be allowed. It would appear in the *Browns* case that the company did have proof of postage which Mr Davies readily accepted his company did not. However, just as the Tribunal in *Browns* accepted that there could be postal delays, we were urged by Mr Davies to find likewise and as it was the company's case that the cheques were all posted in such time as should have been received by the 19th, we should find that it was through delays in the post that they were not so received.

13. Mr Davies, in his oral submissions in respect of proportionality, relied upon the First-tier Tribunal decision in *Hok Limited*, which he had been unaware had been overturned in the Upper Tribunal. Mr Morgan supplied Mr Davies with copies of the Upper Tier decisions in both *Hok* and *Total Technology (Engineering) Limited* and we adjourned to allow Mr Davies to put in written submissions which we summarise as follows. Mr Davies again submitted that the company had received no warning notice and the fairness of the penalty regime as discussed in paragraph 84 of *Total*

Technology was predicated on a warning notice having been sent. Similarly in *Hok*, it was undisputed that the company had received a warning. As Swifts had no knowledge of the defaults, it was not known that they were incurring a penalty until the end of the year. Further, in *Hok*, no decision was reached on the fairness of the procedure of not advising of defaults until the end of the tax year. In this regard, Mr Davies requested that the Tribunal should be reconvened to allow Mr Morgan to be cross-examined on the procedure of HMRC and its fairness. In response, Mr Morgan offered no objection to the Tribunal being reconvened but advised that as he was not involved in policy-making, he could not take matters much further. In further response to this, Mr Davies requested that not only should the Tribunal reconvene but that a senior public servant should be called to explained the fairness of the policy.

Conclusions

14. Fundamental to the majority of Mr Davies' submissions was whether or not the company had received the initial warning letter of 28 May 2010. We were referred to the Brocs computer printout which clearly records the fact of it having been issued. It would have been sent to the company address which the Respondents held and it is not recorded as having been returned undelivered. We accept and find as a fact that it was sent out by the Respondents and we see no reason why it should not have been received within the company, although that is not to say that Mr Davies or Mr Nichols saw it. What matters is that it was sent out by the Respondents and received by the company. There was the further letter of 27 September 2010 which again is recorded as having been sent with no record of it having been returned. There are also the seven telephone calls, all of which we accept and find as a fact were made. The combination of the letters and the phone calls render it inconceivable that the company, through its personnel, did not know of the defaults. Indeed it is difficult to see how much more the Respondents could have done to alert the company to the fact that it was in regular default. We were surprised at Mr Nichols' evidence that he was not aware of the penalty regime until the penalty notice was received. We again find as a fact that the company would have been sent the huge amount of employer information warning of the regime and it is up to the company to make sure that HMRC information and publications goes to the relevant person in the company. The fact that it did not arrive on Mr Nichols' desk is unfortunate but again is not the fault of the Respondents. Given these findings of fact, we did not consider it necessary to reconvene the Tribunal or to call for further evidence on the issue of the fairness of the regime.

15. In line with the reasoning of the Upper Tribunal in *Total Technology*, we do not believe that the amounts of the penalty are disproportionate or irrational. The scheme is structured and the penalty is then progressive to correspond with the escalating number of defaults. There is nothing unfair in this. MR Davies did not challenge the mathematical calculation of the penalty, only its fairness.

16. We cannot accept Mr Davies' contention that the cheques were in fact sent out in such time as they should have been received on time. Clearly there can be the occasional postal delay but not in every period and further, if Mr Nichols was correct in his evidence, the postal delays were huge. His evidence was that the cheques were

sent out no later than the day after he made them out. Given the dates of the cheques (paragraph 6) it is not credible that (with the exception of the November payment) not one of those cheques arrived by the due date. The December cheque for example would have been posted no later than 8 December and yet did not arrive until the 24th. The September cheque would have been posted no later than the 11th and did not arrive until the 28th.

17. In summary, we can find no reasonable excuse. We do not accept that the cheques were sent in such time as they should have arrived by the due date and finally we find that given the warning letters and the contents of the telephone conversations, the company received abundant warning that they were in default. Consequently we do not accept that the regime as it was applied here was in any way unfair or that the penalty was disproportionate.

18. The appeal is dismissed.

19. 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.

LADY JUDITH MITTING
TRIBUNAL JUDGE

RELEASE DATE: 6 January 2014