

[2014] UKFTT 0757 (TC)



TC03876

Appeal number: TC/2014/02114

INCOME TAX - Penalties - late payment of PAYE and NICs - Schedule 56 Finance Act 2009 - whether reasonable excuse due to insufficiency of funds – no- whether penalty unfair – no – whether penalty disproportionate – no.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

FALCONWOOD EMPLOYMENT AGENCY LIMITED Appellant

- and -

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

**TRIBUNAL: JUDGE JOANNA LYONS
MICHAEL SHARP**

Sitting in public at Bedford Square on 26 June 2014

No representative attended on behalf of the appellant company

Beverley Levy, officer of HM Revenue and Customs, for the Respondents

CROWN COPYRIGHT 2014

DECISION

Introduction

1. This is an appeal against a penalty of £8,147.74 imposed for the late payment of Pay as you earn (PAYE) tax and national insurance contributions (NIC) for the tax year ending 5 April 2013. The penalty was imposed in accordance with Paragraphs 6 and 7 Schedule 56 Finance Act 2009 (“FA”).

Non attendance by the appellant

2. Mr Keith Pittis is the managing director of the appellant company (“the company”). He wrote to the Tribunal stating that he would not be attending the hearing and was content for the matter to proceed in his absence.

3. Rule 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 provides that the Tribunal may proceed in the absence of the appellant if it is in the interests of justice to do so. We considered that it was in the interests of justice to proceed with the hearing in absence as the company had provided their written consent to this course of action.

The issues

4. The appellant appeals on the following grounds :-

- (1) There is a reasonable excuse for the late payment due to an insufficiency of funds.
- (2) The penalty is unfair and disproportionate.

The Law

5. The legislation was not in dispute however the relevant provisions are set out below. In this decision the term PAYE is taken to mean both PAYE and NIC.

Liability for the penalty

6. Regulation 69 of the Income Tax PAYE Regulations 2003 (SI 2003 No 2682) provides that an employer is due to pay monthly PAYE payments within 14 days of the end of the tax period where payment is made by cheque. The effect of these provisions is that the tax is due on the 17th day of each month. This requirement also applies to NICs in accordance with Regulation 67 Social Security (Contributions) Regulations 2001.

7. Schedule 56 Finance Act 2009 (“FA”) introduced a new penalty regime for late payment of tax including late payments of employer’s PAYE. Paragraph 1(1) provides that penalties are payable by a person “P” where P fails to pay an amount payable under the regulations by the due date.

8. The amount of the penalty is determined on a sliding scale depending upon the number of defaults and the total amount of the late payment. Paragraph 6(7) provides:

“If P makes 10 or more defaults during the tax year, P is liable to a penalty of 4% of the total amount of those defaults”.

5 9. If the tax remains unpaid after 6 months an additional penalty of 5% of the unpaid tax is imposed. Paragraph 7 Schedule 56 FA.

10. In calculating the number of defaults the first default in the tax year is not taken into account Paragraph 6(3). The final default is not taken into account in accordance with the decision in the case of *Agar Limited v HMRC [2011] UKFTT 773 (TC)*.

10 *Reasonable excuse*

11. A penalty may not be incurred if there is a “reasonable excuse” for the default. The term “reasonable excuse” is not defined in the legislation however Paragraph 16 Schedule 56 FA provides:

15 (1) Liability to a penalty ...does not arise in relation to a failure to make a payment if P satisfies HMRC or (on appeal) the first-tier Tribunal...that there is a reasonable excuse for the failure.

(2) For the purposes of sub-paragraph (1)

(a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P’s control.

20 (b) where P relies upon any person to do anything, that is not a reasonable excuse unless P took reasonable steps to avoid the failure

Special circumstances

12. HMRC may cancel or reduce a penalty if they think it is right to do so due to special circumstances, Paragraph 9(1) Schedule 56 FA. The term “special circumstances” is not defined however it must be “something different from and wider than reasonable excuse”. *Rodney Warren and Co v HMRC [2012] UKFTT 57 (TC)*. Special circumstances do not include the inability to pay, Paragraph 9(2)(a).

13. The Tribunal may reconsider the issue of special circumstances and cancel or reduce a penalty only if it is satisfied that the decision of HMRC was flawed. Paragraph 15(3)(b). In this context the term “flawed” means flawed when considered in the light of the principles applicable in proceedings for judicial review, Paragraph 15(4).

The facts

14. The Tribunal heard from Mrs Levy on behalf of the Respondents and read the bundle of documents provided together with the appellant’s correspondence. The facts set out below were not disputed.

History of late payment

15. The company had long a history of late payments. Between 2004 only two PAYE payments had been made on time.

The penalty

5 16. For the tax year 2012-13 the company were due to make monthly payments of PAYE in accordance with the Regulations. Payment was made by cheque which was due on 17th of each month. Late payments of PAYE were made in every calendar month. The periods of the late payments ranged from 3 to 58 days. The payment for the tax period ending 5 June 2012 remains outstanding.

10 17. HMRC imposed a late payment penalty in accordance with Paragraph 6 Schedule 56 FA. The penalty was calculated on a sliding scale in accordance with the number of defaults and the amount of the late payment. The first default and final defaults were not taken into account in calculating the penalty in accordance with Para 6(3) and the case of *HMRC v Agar (above)*. Accordingly there were 10
15 qualifying defaults and a penalty of 4% was applied in accordance with paragraph 6(7) Schedule 56 FA. The amount of the late payment of tax was £181,929.38. The penalty applied was £7,277.17.

18. For the period ending 05 June 2012 the PAYE was not paid six months after the due date and a second late payment penalty of £870.57, being 5% of the unpaid tax,
20 was imposed in accordance with Paragraph 7 Schedule 56 FA. The tax due amounted to £17,411.96 and remains unpaid.

19. The first and second late payment penalties amounted to £8,147.74 and were imposed on 19 December 2013.

The business

25 20. The company operates as an employment agency providing temporary staff to companies and public bodies. The company pays wages to staff before payment is received from their clients. The company have experienced persistent levels of delayed payment which has had a significant long term affect on their cash flow.

21. One of their major clients, Bromley council, extended its payment terms from
30 30 to 75 days. Another important client, Mitie, extended their payment terms from 30 days to 60 days. These events occurred prior to the beginning of the tax year 2012-13.

22. The company contacted HMRC on several occasions regarding the late payments. A request for time to pay was made on 17 September 2012 however no firm arrangement could be made as the company did not put forward specific payment
35 terms.

The arguments

The Appellant's case

23. Mr Pittis submits that the late payments occurred due to an insufficiency of funds occasioned by the extended payment terms demanded by their clients.

- 5 24. He asserts that the penalty imposed is “draconian” in the circumstances and will cause further damage to the business.

The Respondent's case

10 25. The Respondent's submit that any insufficiency of funds occurred as a result of the normal hazards of trade and did not arise from circumstances outside the company's control. They submit that the company has made persistent late payments over many years and the extension of payment terms could not be said to be the cause of the late payments.

26. They also submit that Mr Pittis did not act reasonably in that he did not make a request for time to pay despite having been on notice of the extended payment terms.

15 **Discussion**

Reasonable excuse insufficiency of funds

20 27. We accept that the company were forced to extend their payment terms during 2012-13 as this evidence has not been disputed. However the company has not provided any evidence to show how the late payments brought about the insufficiency of funds such that they were unable to pay the tax on time.

28. In the event that there was an insufficiency of funds there is no evidence to show that this was caused by the change in payment terms on the part of Mitie and Bromley Council. Indeed the company appears to have experienced cash flow difficulties for many years as evidenced by the consistent late payments of PAYE.

25 29. We found that Mr Pittis did not take reasonable steps to avoid the late payment by making a time to pay agreement with HMRC. In addition there is no evidence to show that he sought alternative means of funding such as an extended bank loan.

30. For these reasons we do not find that there is a reasonable excuse for the late payment.

30 *Special circumstances*

35 31. This Tribunal has the power to reconsider the issue of special circumstances if HMRC's decision is flawed, Paragraph 15(3) Schedule 56 FA. In this case HMRC have decided not to exercise their discretion to cancel or reduce this penalty due to special circumstances. We do not find that this amounts to a flawed decision because no circumstances have been advanced beyond the issue of reasonable excuse. In addition special circumstances do not include the inability to pay, Paragraph 9(2)(a).

Proportionality and Fairness

32. The issue of fairness was considered by the Upper Tribunal in the case of the *Commissioners for Her Majesty's Revenue and Customs v Hok Limited [2012] UKUT 363 (TCC)*. The Tribunal said

5 “the first tier Tribunal has only that jurisdiction which has been conferred on it by statute and can go no further.[56]...It follows that in purporting to discharge the penalties on the ground that their imposition was unfair the Tribunal was acting in excess of its jurisdiction”.[58]

10 33. There is no statutory ground of appeal based upon fairness and accordingly this Tribunal has no jurisdiction to discharge the penalty on the grounds that its imposition is unfair. In any event we do not find that the penalty has been unfairly imposed as the company were warned in advance that penalties would be imposed and nonetheless continued to make late payments throughout the tax year.

15 34. As to the issue of proportionality we considered the decision of the First Tier Tribunal in the case of *Dina Foods Limited v Revenue & Customs [2011] UKFTT 709 (TC)* which considered the penalties imposed under Paragraph 6 Schedule 56 FA. We respectfully agree with the following comments of Judge Berner :-

20 “any penalty may be perceived as harsh, we do not consider that the levying of the penalty in this case was plainly unfair. ...Although the size of penalty ...may seem harsh, the scheme of the legislation is in our view within the margin of appreciation afforded to the State in this respect. Accordingly we find that no Convention right has been infringed and the appeal cannot succeed on that basis.”[42]

25 35. In the case of *HMRC v Total Technology Limited [2012] UKUT 418 (TCC)* the Upper Tribunal observed :-

30 “The State must be entitled to impose the penalty which it considers to be the most efficacious for achieving the aim pursued constrained only by the requirement that the penalty is not disproportionate to the gravity of the infringement. And here we would accept that, to use the words of the Convention jurisprudence, a wide margin of appreciation should be afforded to the state” [73]

35 36. We accept that this is a substantial penalty for the company. However we do not find the penalty to be unlawful or disproportionate in accordance with the principles set out in *Dina Foods Limited and Total Technology Limited (above)*. The penalty was correctly imposed in accordance with the legislation and was proportionate to the amount of the late payment and the number of defaults.

Decision

37. For the reasons given above, the Tribunal dismisses the appeal.

Rights of appeal

38. 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.

10

**JOANNA LYONS
TRIBUNAL JUDGE**

RELEASE DATE: 04 August 2014

15