TC02261

Appeal number: TC/2011/09669

Penalty - Late payment of PAYE - FA 2009 Sch 56 - Reasonable excuse for late payment - Reliance on others - Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

JOSEPH ROBERTSON LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE SCOTT, LLB, NP
PETER R SHEPPARD FCIS, FCIB, CTA

Sitting in public at Atholl House, Guild Street, Aberdeen on Friday 31 August 2012

Malcolm Robertson for the Appellant

Chris Cowan, HM Revenue and Customs, for the Respondents

DECISION

1. This was an Appeal by Joseph Robertson (Aberdeen) Ltd (the company) against a penalty determination issued by HMRC under Schedule 56 Finance Act 2009 for late payment of PAYE for tax year 2010-11.

2. The relevant legislation is contained in Schedule 56 Finance Act 2009 (Sch 56), as amended by Schedule 11 Finance (No 3) Act 2010. That amended legislation applies to penalty assessments raised after 25 January 2011, which is the situation in this case. A clear summary of Sch 56 is set out by Judge Berner in *Dina Foods v HMRC* [2011] UKFTT 709. The company referred to other tax cases decided by the FTT. The Tribunal noted same, is aware of, and not bound by the range of decisions by the FTT in similar matters. Each case must be decided on its own facts and merits.

3. In summary, if payments of PAYE are late in the course of the tax year, after the end of the tax year and only then, HMRC can and will calculate the quantum of the penalty on a sliding scale. The penalty will not be levied (a) if a time to pay agreement (TTP) had been agreed in advance of the due date(s) and that was not the case in this instance, (b) if there are "special circumstances in terms of paragraph 9 Schedule 56: there were none, and (c) if the taxpayer can establish that there was a reasonable excuse for each or any default.

4. Although it took some considerable time in the course of the Hearing to decipher the meaning of the entries in the BROCs printouts produced by HMRC, nevertheless, it was not disputed that only the payment due in month six had been made timeously. The payments in months one to six had been made by cheque and therefore were due by the 19th of the month. In month seven, although payment was initially made by cheque, and timeously, that cheque could not be honoured, was returned and payment subsequently effected by electronic means but not BACS. None of the subsequent payments in that year were received by HMRC within the requisite time limit. Unfortunately for the company the system whereby non BACS electronic payments were treated as received earlier changed only on 16 December 2011 which is outwith the period with which this Tribunal is concerned.

5. There were 11 payments, which were late in the year. In calculating the default penalty, the first failure for the tax year does not count as a default for that year and following the case of *Agar Ltd v Revenue & Customs* [2011] UKFTT 773 (TC) the last payment does not fall to be included. Accordingly, it was a matter of agreement that the total amount of the relevant defaults was £698,885.09. In terms of the legislation the default penalty is 3% of that amount, namely £20,996.55.

6. Since the amount and number of the defaults was not in dispute, the issue for the Tribunal therefore was to establish if there had been a reasonable excuse for any of the late payments.

7. The arguments advanced by the company were that the payments had only been late by a day or so, they believed that there had been very limited communication

from HMRC, that they should have had guidance and if they had been aware of the potential scale of the penalties they would have done more at an earlier date, that the imposition of penalties was arbitrary, unfair and disproportionate and that overall there was a complete lack of clarity in the penalty regime because the law was ambiguous. Much was made of the assertion that HMRC had said that they "could" or "may" face penalties and that lacked clarity. They also argued that they had been selected for penalties based on their ability to pay.

8. Mr Mundy confirmed that the record of telephone call between him and HMRC on 28 September 2010 was accurate. That was to the effect that HMRC contacted him, he was not aware of the penalty regime and that it was explained to him in detail including the percentages. He was referred to the website and he explained that there was no major reason for late payment. He had been "horrified" by the penalty regime and undertook to look into electronic payment in future.

9. The website makes the deadlines for payment absolutely clear:

> " PAYE/Class 1 NICs electronic payment deadline
>
> Your cleared payment must reach HMRC's bank account no later than the 22nd of the month following the end of the tax month or quarter to which it relates.
>
> PAYE/Class 1 NICs postal payment deadlines
>
> …..please ensure your cheque reaches HMRC no later than the 19th of the month following the end of the tax month or quarter to which it relates."

10. The fact that the payments were only late by a day or so cannot amount to a reasonable excuse: they were late and that triggers the penalty.

11. Although the evidence was that the Directors had not been aware of receiving correspondence from HMRC in relation to penalties before 28 September 2010, the Tribunal accepted that the then accountant, Mrs Mellis who subsequently left the company for "performance issues" then dealt with those matters. There is no evidence that any mail was returned. It is clear that the standard penalty default letter had been issued on 28 May 2010. That letter gives information on the penalty regime and information about the websites and the Business Payment Support Service. No approach was ever made to the Business Payment Support Service. Further, on 3 June and 31 August 2010 Form P101, stating that payments were late, was also issued. On 28 August 2010 HMRC recorded a telephone conversation with a Mrs Nailer who said that payment had been overlooked. She was educated about penalties. It was argued for the company that they had never employed a Mrs Nailer. The Tribunal finds on the balance of probability that it was a clerical error in recording the name given that the amount of the payment was correct and that therefore that conversation had taken place. Reliance on a third party does not constitute a reasonable excuse (paragraph 16(2)(b) Sch 56) unless the taxpayer "took reasonable care to avoid the failure". A prudent employer would ensure that tax obligations were honoured timeously and that their employees were performing to an appropriate standard.

12. The Tribunal finds that (a) the penalty regime established by the statute gives no discretion (subject to paragraph 9): the rate of penalty is simply driven by the number of PAYE late payments in the tax year by the employer; (b) the legislation does not require HMRC to issue warnings to individual employers and in this instance, they have issued a warning letter and they have issued general material about the new system both on the website and in Employers Bulletins; and (c) lack of awareness of the penalty regime is not capable of constituting a special circumstance; in any event, no reasonable employer, aware generally of its responsibilities to make timely payments of PAYE and NICs amounts due, could fail to have seen and taken note of at least some of the information published and provided by HMRC; (d) any perceived failure on the part of HMRC to issue specific warnings to defaulting taxpayers, whether in respect of the imposition of penalties or the fact of late payment, is not of itself capable of amounting either to a reasonable excuse or special circumstances; (e) the use of terminology such as "could" and "may" is appropriate, does not lack clarity and is reflective of the legislation because it is only after the end of the tax year has elapsed that HMRC can consider whether a penalty or penalty has been triggered and then and only then can they consider, as laid down by statute, whether special circumstances obtain or if there is a reasonable excuse for late payment. Until that point the future imperfect is the correct tense to be utilised.

13. The Tribunal does not accept that the way in which the system operates is contrary to paragraph 11 of Sch 56, or contrary to any common law principle of fairness. The Tribunal does not have jurisdiction over alleged breaches of the Taxpayer's Charter such as the allegation that the decision to impose penalties was unfair and driven by the taxpayers ability to pay. Even if it did, the Tribunal is not persuaded on the material before it that there has been any such breach.

14. The Tribunal notes the argument that the penalty imposed is harsh. There is case law on this point including the case of *Dina Foods*, referred to in paragraph 2 above, where the question of harsh penalties is covered at paragraphs 41 and 42 which reads as follows:

> "41. The issue of proportionality in this context is one of human rights, and whether, in accordance with the European Convention on Human Rights, Dina Foods Ltd could demonstrate that the imposition of the penalty is an unjustified interference with a possession. According to the settled law, in matters of taxation the State enjoys a wide margin of appreciation, and the European Court of Human Rights will respect the legislature's assessment in such matters unless it is devoid of reasonable foundation. Nevertheless, it has been recognised that not merely must the impairment of the individual's rights be no more than is necessary for the attainment of the public policy objective sought, but it must also not impose an excessive burden on the individual concerned. The test is whether the scheme is not merely harsh but plainly unfair so that, however effectively that unfairness may assist in achieving the social objective, it simply cannot be permitted.
>
> 42. Applying this test, whilst any penalty may be perceived as harsh, we do not consider that the levying of the penalty in this case was plainly unfair. It is in

> our view clear that the scheme of the legislation as a whole, which seeks to provide both an incentive for taxpayers to comply with their payment obligations, and the consequence of penalties should they fail to do so, cannot be described as wholly devoid of reasonable foundation. We have described earlier the graduated level of penalties depending on the number of defaults in a tax year, the fact that the first late payment is not counted as a default, the availability of a reasonable excuse defence and the ability to reduce a penalty in special circumstances. The taxpayer also has the right of an appeal to the Tribunal. Although the size of penalty that has rapidly accrued in the current case 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."

15. Lastly, even if there had been any reasonable excuse before 28 September 2011, which is not accepted, there certainly was no excuse thereafter. Mr Mundy was educated about payment dates, the penalty regime and referred to the relevant website. The remaining payments in the year were all still late.

16. For all these reasons the Tribunal finds that the company has not established reasonable excuse for any of the late payments, or that there are special circumstances justifying a mitigation of the penalty, or that the penalty was disproportionate, or that the administration of the penalty regime was unfair. It follows that the appeal must be dismissed.

17. 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.

ANNE SCOTT, LLB, NP
TRIBUNAL JUDGE

RELEASE DATE: 13 September 2012