



**TC02861**

**Appeal number: TC/2011/10227**

*PAYE – late payments – default surcharge – whether reasonable excuse due to insufficiency of funds – no – case dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**MOTOROID LTD**

**Appellant**

**- and -**

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

**TRIBUNAL: DR K KHAN**

**The Tribunal determined this appeal on 24 May 2013 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier) Tribunal (Tax Chamber) Rule 2009 (default paper cases) having first read the Notice of Appeal dated 6 September 2011 and HMRC's Statement of Case dated 22 April 2013.**

## DECISION

### Introduction

5 1. This is an appeal against a penalty charge notified on 11 August 2011 under Schedule 56 of the Finance Act 2009, originally in the amount of £10,510.50. This amount was subsequently reviewed in the light of the Appellant's representations and case law and was amended on three occasions, finally being reduced to £6,711.98 on 12 July 2012.

### 10 Issues for determination

2. The issues for determination is whether the legislation has been correctly applied by Her Majesty's Revenue & Customs ("the Commissioners") and the penalty correctly charged and whether or not there is a reasonable excuse for late payment and the penalties are fair and proportionate.

### 15 Background facts

(1) On 29 July 2011, the first default occurred in the year ending 5 April 2011 (month 3) and the Appellants were issued a letter of warning that further late payments may incur a penalty.

20 (2) On 11 August 2011 a penalty was charged and issued in the sum of £10,510.50. The Notice records 11 defaults with the first one disregarded with a penalty calculated at 4% of the tax not paid on time for months 2 to 12. The total amount not paid on time was £249,914 with the first failure in the sum of £31,018.45 disregarded. This left a balance after deduction of £218,896.35.

25 (3) A further 5% penalty was charged on tax paid more than 6 months late. This meant an additional penalty of £1,754.65.

(4) On 6 September 2011 the Appellant disputed the amount and provided further information on payment. The Appellant indicated that the tax for certain periods was paid on time and there was a payment plan for outstanding monies which were already in place considering the company's financial difficulties.

30 (5) On 14 September 2011 the Commissioners responded to the Appellant's query that payments for the months 9, 10, 11 and 12 were paid on time. The Commissioners advised that cleared funds should have been with the Commissioners by the due date and the cheques were not sent on time to be received by the due date on the 19<sup>th</sup> of the month. It was confirmed that  
35 payment for month 8 was received on time but all the other payments were late and the appropriate penalty was charged.

(6) On 10 November 2011 the penalty was revised downwards from £10,510.50 to £7,148.97. This was because there was a time to pay agreement which covers the months 1 and 2 of 2010/11 and the final payment for 2010.

This also resulted in a reduction in the penalty charge of 3%. Reminders were issued for months 3, 4, 5, 7 and 9 when payments were late.

5 (7) On 11 April 2012 the Commissioners stated that month 12 was to be disregarded in light of the decision in *HMRC v. Agar* (TC/2011/04910) which reduced the penalty to £6,888.81 for 9 periods.

(8) After further representations were made on 12 July 2012 the payments were reduced to £6,711.98. This comprises  $£200,393.16 \times 3\% = £6,011.49$  plus tax paid more than 6 months late of  $£14,009.87 \times 5\% = £700.49$ .

### Legislation

10 3. Schedule 56 Finance Act 2009 provides legislation for a penalty to be charged for failure to make payments on time. The penalties are chargeable in respect of failure to PAYE on or before the date when it is due and payable. The level of the penalty is dependent on the number of defaults during a tax year. The first late payment of tax will simply trigger a warning from the Commissioners and will not be subject to a  
15 penalty unless it is more than 6 months late. After the first late payment any subsequent late payments will be regarded as default and these defaults will be subject to a penalty. For 1, 2, 3 defaults the penalty is 1%; 4, 5, 6 defaults the penalty is 2%; 7, 8, 9 defaults the penalty is 3% and 10, 11, 12 the penalty is 4%. In addition, if any amount of tax and national insurance due is more than 6 months late, a further penalty  
20 of 5% of the amount outstanding will be levied. If the amount is still outstanding after 12 months from the due an additional 5% will be levied. Where there are time to pay arrangements these fall outside of these provisions providing the trader complies with the terms of the agreement.

25 4. The legislation provides that the decision to issue a penalty can be appealed by the taxpayer if they have a reasonable excuse for the late payment. An insufficiency of funds is not a reasonable excuse unless attributable to events outside the taxpayer's control. Relying on a third party is not a reasonable excuse unless the taxpayer took reasonable steps.

### Appellants' Grounds of Appeal

30 (1) The Appellants make several points and in particular disputes that the months of 9 to 12 were late.

(2) They explained that the company was in financial difficulties with hard trading conditions and were prepared to pay £4,454.76 based on months 9 to 12 being excluded.

35 (3) They say that the imposition of the penalty is unfair.

(4) In their letter of 27 September the Appellants make the following points:

40 I have explained ... that we recently had an underperforming director, who no longer works in the business. Just make things even more difficult, his brother-in-law was our accountant/financial adviser. We have incurred extra expenses by way of new accountants to correct and amend our accounts. There were also large costs for legal advice,

which strained our resources substantially. Luckily we had a credit on our Corporation Tax account and was therefore allowed to make a payment plan for Corporation Tax, under exceptional circumstances.”

### **Respondents’ contentions**

- 5 (1) The Respondents contend that months 9 to 12 were late though month 12 has now been disregarded.
- (2) The Appellants should have been in no doubt that payment was late given that a warning letter was issued on 29 July 2010 and that there was a new penalty regime in place in view of the publicity given to it.
- 10 (3) Insufficiency of funds does not constitute a reasonable excuse under the legislation unless caused by events outside of the Appellants’ control.
- (4) Question of fairness is not a matter within the Tribunal’s remit but is a matter for the High Court by way of judicial review.
- 15 (5) The stage increases to the rate of penalty charged provide for a proportion of penalty which takes account of the number of defaults and the amounts unpaid. The penalty is fair as it is progressive, the first time there is no penalty and as the failures increase the penalty charged increases. The penalty cannot be fully calculated until all failures are known which is at the end of the year.

### **Conclusion**

- 20 5. The onus of proof rest with the Respondents to demonstrate that the Appellant has failed to pay his tax on time, so that a penalty is incurred. If this is established the burden is then on the Appellant to show that there was a reasonable excuse. The common law standard of a balance of probability applies.
- 25 6. The Tribunal is aware that a reasonable excuse does not arise from an insufficiency of funds unless it is attributable to events outside of the taxpayer’s control. There is no doubt that the company had experienced cash flow difficulties like many other companies during the recession. The question is whether those difficulties arose as a result of events which were outside of the Appellants’ control.
- 30 7. In looking at the question of reasonable excuse, the Tribunal must look at each of the defaults and look to ascertain whether the Appellants had a reasonable excuse at the time. In other words, it is necessary to establish whether the insufficiency of funds caused by events outside of their control existed at the time of each default. In this sense it may be possible to have one or two defaults removed on that basis thus reducing the amount on which the penalty is charged as well as possibly cutting the
- 35 rate of penalty charge.
8. The Appellants say that they had an “underperforming director” and problems with their accountant/financial adviser. There were large costs for legal advice which has drained the company of its resources. They also explained that there had been substantial cost-cutting to the Company’s budget. There is no doubt that some of
- 40 these costs may not have been foreseen but in the correspondence it is very difficult to

establish the periods to which these expenditures relate. It is accepted that the Company has insufficient funds but that on its own does not give a reasonable excuse.

9. It would have been helpful if the Appellants had explained in some detail how the insufficiency of funds arose and how it related to specific periods of default. Sadly this was not done. The Tribunal therefore would have difficulty in identifying whether a reasonable excuse arose with regard to particular defaults.

10. The Commissioners have taken into account the representations of the Appellant and reduced the charges by some £4,000. The Appellants themselves say that they are able to afford approximately £4,500 which is about £2,000 less than the present penalty.

11. The Tribunal has concluded that the insufficiency of funds on its own is not a reasonable excuse and the events giving rise to that insufficiency of funds has not been properly explained so as to allow the Tribunal to make a determination on whether the events giving rise to such insufficiency were outside of the control of the Appellant. There is therefore no reasonable excuse in the circumstances.

12. It is accepted that if payments were a few days late that the penalty does appear harsh. If however the penalty was 5 months late then a 1% penalty appears to be a cheap rate for borrowing. This is not to say that trading conditions are not difficult for the Appellants.

13. The Tribunal cannot look at the question of fairness that is a question for judicial review.

14. In the circumstances the Tribunal finds that a penalty is correctly charged in the reduced amount of £6,711.98 and the appeal is accordingly dismissed.

15. 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.

**DR K KHAN**  
**TRIBUNAL JUDGE**

**RELEASE DATE: 14 August 2013**