



TC03205

Appeal number: TC/2012/05244

INCOME TAX –PAYE payments paid late on 10 occasions - £5,841.89 late penalties due- appellant did not have a reasonable excuse for the failure – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

EXECUTIVE GROUP HOLDINGS LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE DAVID S PORTER
ANN CHRISTIAN**

Sitting in public at Alexandra House, Manchester on 18 November 2013

Mr Philip Jones, an Inspector of Taxes, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents and no one appearing for the Appellant

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DECISION

1. Judge Porter asked his clerk to telephone Mr Michael Tiven of Shacter, Cohen & Bor Ltd, the Appellant's accountant, and he was told that the Appellant was aware of the hearing and that Mr Tiven would not be attending. Judge Porter decided to hear the case in the absence of the Appellant under rule 33 of the Tribunal Procedure Rules (First-tier Tribunal) (Tax Chamber) Rules 2009 as the Appellant had been advised as to the date of the hearing and it was in the interests of justice to proceed with the hearing.

2. Mr Philip Jones (Mr Jones) an Inspector of Taxes, appeared on behalf of the Respondents (HMRC) and produced a bundle of documents to the Tribunal and his speaking notes. Mr Jones referred us to several case but we note that they are all superseded by *The Commissioners for her Majesty's Revenue and Customs v Hok Ltd* [2012] UKUT 363 (TCC) in which the Upper Tribunal has confirmed that the legislation with regard to PAYE and NIC returns is proportional and fair

The Law

3. Regulation 69 Income Tax (PAYE) regulations 2003 (SI 2003 NO 2682) (folio 63) determines when an employer must pay amounts of tax they are required to deduct under regulation 68(2)

(a) within 17 days after the end of the tax period, where payment is made by an approved method of electronic communications, or

(b) within 14 days of the end of the tax period, in any other case.

(There are the same requirements for the payment of the NIC liability)

A penalty arises where the payment is made after the 19th day if a manual payment is being made and after the 22nd day if an electronic payment is being made. The amount of the penalty is determined by reference to the number of defaults made during the tax year although the first default in the tax year does not count towards the number of defaults. The percentages increase progressively throughout the year from 0% to 1%, 2%, 3%, and 4%.

Paragraph 15 (folio 38) provides that the Tribunal may affirm, cancel or substitute HMRC's decision with another decision which HMRC has the power to make

Paragraph 16 states that if there is a reasonable excuse for the failure to pay on time then there will be no penalty, but paragraph 16 sub-paragraph (2) states that:

- an insufficiency of funds is not a reasonable excuse, unless attributable to events outside P's control
- the reliance on somebody else to do something is not a reasonable excuse unless reasonable care has been taken to avoid the failure.
- If there was a reasonable excuse for the failure that excuse is deemed to have continued if the failure is remedied without unreasonable delay once the excuse ceased.

The facts

3. Mr Jones told us that the Appellant appeals against a penalty charged by HMRC 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 issued on 11 August 2011 and amounted to £6,362.84 but was reduced to £5,841.87 in light of the decision in *Agar Limited* TC/2011/04910 as the month 12 default does not crystallise until after 6 April 2011 which is outside the 2010/11 tax year.

4. The Appellant made late payments for all the 12 months in the year ended 5 April 2011. However, only 10 of those failures count towards the penalty as one is disregarded as it is the first failure and the last failure falls in the following year. The Appellants failures were as follows:

Month	Date due	Date paid	Days late
1	21 May 2010	25 May 2010	4 not counted
2	22 June 2010	25 June 2010	3
3	22 July 2010	23 July 2010	1
4	20 August 2010	25 August 2010	5
5	22 September 2010	24 September 2010	2
6	22 October 2010	27 October 2010	5
7	22 November 2010	29 November 2010	7
8	22 December 2010	27 December 2010	5
9	21 January 2011	31 January 2011	10
10	22 February 2011	3 March 2011	9
11	22 March 2011	25 March 2011	3
12	21 April 2011	27 April 2011	Following year

15 The penalty amounted to £5,841.89 on a total amount of late payments of £158,938.80

5. Before issuing a penalty, HMRC reviews the case to see if, from its records, it can identify a reasonable excuse or special circumstances. The changes to the PAYE system were introduced in the 2009 budget. HMRC publicised the new late payment penalties for PAYE extensively. An employer pack featuring a CD-ROM was mailed to employers in February 2010. HMRC records show that a new employer record was

set up on 13 August 2010 and an ‘Employers Pack’ would have been sent. A P30 (b) letter was sent to the Appellant at 96A Wilderspool Causeway WA4 6PU on 7 February 2010 and 6 February 2011. A late penalty warning letter was sent on 28 May 2010. This is a computer generated notice although Shacter, Cohen & Bor Ltd in their letter of 27 April 2012 said that the Company had not received this notice.

6. Mr Tiven believes that the Appellant has a reasonable excuse because it paid its monthly PAYE to HMRC on or around the 27 of each month instead of the 22. This was a mistake on the part of the Appellant, which was perpetuated until it received the penalty notice for £6,392.84. In his letter of 27 April 2012 (referred to above) Mr Tiven also referred HMRC to *Leachman v HMRC* UKTT261 in which the Tribunal ruled that a genuine mistake can constitute ‘reasonable excuse’ and applied the *European Court of Justice v Finland* precedent that actions resulting in penalties need to be proved beyond reasonable doubt. Ann Redston in *Writtle College Services Ltd v Revenue and Customs* [TC01325] said that an excuse was likely to be reasonable “where the taxpayer acts in the same way as someone who intends to honour their tax liabilities and obligations would act”. He believed that that is an accurate description of the Appellant’s behaviour. He also considered that the penalty was disproportionate.

The decision

7. The Upper Tribunal decided the case of *Hok Ltd* on 23 October 2013. We think it would be helpful to identify the findings as the case over rules all the cases to which we have been referred by HMRC and the cases mentioned by Mr Tiven.

“The Tribunal held that the First-tier Tribunal has only that jurisdiction which has been conferred on it by statute, and can go no further, it does not matter whether the Tribunal purports to exercise a judicial review function or instead claims to be applying common law principles; neither course is within its jurisdiction.....It follows that in purporting to discharge the penalties on the ground that their imposition was unfair The Tribunal was acting in excess of jurisdiction, and its decision must be quashed.”

8. The Appellant had been advised by Shacter, Cohen & Bor Ltd who should have been aware of the changes made by the 2009 Budget. From the table above it is clear that the Appellant has continued to pay its PAYE as in the past completely unaware, it says, of the changes made by the new legislation. We are aware that HMRC have changed the way that they now notify taxpayers of a potential penalty liability in that an earlier warning is now given. However, it is no part of HMRC’s duty to notify a taxpayer as to its tax responsibilities (See *Hok Ltd* paragraph 61). We do not accept that the Appellant has a reasonable excuse. It has a responsibility to ensure that it completes its PAYE and NIC returns on time. It alleges that there was a genuine mistake. We have decided that there was no mistake as it has paid no regard to the new rules as demonstrated by the various delays in its payments. The legislation does not allow the Appellant to rely on a third party, in this case its accountants.

9. We are satisfied that HMRC considered the penalty and whether there were any special circumstances, over and above a reasonable excuse, which would allow the appeal. We therefore dismiss the appeal; confirm that the Appellant does not have a reasonable excuse for its failure; and that the Penalty Of £5,841.87 is correctly due under Schedule 56 of the Finance Act 2009.

10. The hearing having taken place in the absence of the Appellant, the Appellant has a right to apply for this decision to be set aside pursuant to Rule 38 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“the Rules”). The Appellant has a right to apply for permission to appeal against this decision pursuant to Rule 39 of the Rules. 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.

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**DAVID S PORTER
TRIBUNAL JUDGE**

RELEASE DATE: 6 January 2014

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