



TC03521

Appeal number: TC/2013/02221

Income Tax – PAYE – Penalty – late payment – reasonable excuse based on unforeseen trading circumstances – effect arising from insufficiency of funds – appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ANACONDA EQUIPMENT INTERNATIONAL LIMITED Appellant

- and -

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

**TRIBUNAL: JUDGE IAN W. HUDDLESTON
MS CELINE CORRIGAN**

Sitting in public at Bedford Street, Belfast on 28 August 2013

Colin Stockman, Officer of HMRC

Mr Shane Mallon, Accountant for the Appellant

DECISION

Appeal

- 5 1. This is an Appeal against a penalty of £5,551.19 issued under Schedule 56 of the Finance Act 2009 (FA2009) for multiple late payments of PAYE arising during the tax year 2011/12. Due to the number of defaults the penalty is calculated at 3% in accordance with paragraph 6(2) of Schedule 56.

Evidence/Appearances

- 10 2. Mr Colin Stockman of HMRC appeared on behalf of the Respondent together with Ms Debbie Williams who was the assessing officer and officer who issued the penalties.
3. Mr Shane Mallon, Accountant, employed by the Appellant, appeared on behalf of the Appellant.

The Facts

- 15 4. The facts as regards the late payments themselves are not in dispute. The Tribunal was presented with a table which illustrated nine late payments of PAYE during the tax year 2011/12. The periods of the delay in payment ranged from 43 days to 9 days with an overall average throughout the year of 19.5 days.
- 20 5. The Appellant did not dispute the table or the fact of the late payments themselves.

The Appellant's Case

- 25 6. Part of the Appellant's case had been already put when HMRC was originally asked to review its decision. The upholding (on review) of the decision to apply the penalties prompted the Appellant to appeal. From the correspondence between the parties (and here I summarise) the Appellant's grounds for appeal were as follows:-

- the average number of days for which payments were late was 19.5 days;
- that the Appellant's business model was very different from that of most of their competitors in that 90% of their trading related to overseas sales;
- 30 • that as regards the penalties themselves and the conversations with HMRC the Appellant was not advised that extra time could be given or time to pay arrangements entered into;
- that the Appellant believed that the penalty was much too high and calculated at too high a rate.

- 35 Those were, as I have said, in summary, the grounds upon which the Appellant had advanced its appeal upon the papers before us. Mr Shane Mallon, however, had submitted additional grounds under cover of his email of the 26 August 2013 (ie. two

days before the appeal hearing itself). In that email the Appellant referred to the case of *Cuco v Commissioners for Her Majesty's Revenue & Customs (TC02550)* which he advanced before the Tribunal was on "all fours" with the Appellant's case. Specifically on the evidence he presented to the Tribunal he indicated that he had previously been under the impression that insufficiency of funds was never a reason for non-payment and therefore did not pursue that. Having considered the case of Cuco he decided to advance additional propositions in support of the Appellant's appeal to the Tribunal.

7. The first of these related to the financing of the Appellant itself. Mr Mallon produced correspondence from Ulster Bank dated October 2011 which confirmed that the Bank had sought to reduce the overdraft facility available to the Appellant to £355,000 with an additional requirement that there be a further reduction of £20,000 per calendar month thereafter. The evidence given to the Tribunal was that this compounded an already straightened cash flow and led the Appellant into a position where it had no alternative but to refinance. That refinancing did not, however, occur until 2012.

8. As regards HMRC's assertion that the Appellant had been an habitual late payer of PAYE throughout the earlier years (in particular 2007/08 onwards) Mr Mallon adduced accounts for those periods which showed a reduction in turnover from £6.19million in 2008 to £2.04million in 2010. His evidence to the Tribunal was that 2010 was the "low point" and by 2011 onwards the turnover started to increase (the accounts confirmed that turnover was at the level of £3.3million in 2011).

9. Mr Mallon proceeded to explain to the Tribunal that the trading circumstances of the Appellant changed dramatically - largely through the loss of two material clients which accounted for approximately 67% of the company's turnover. The two clients concerned were Powerscreen and McCloskey International. Both companies were long term customers of the Appellant but due to the recession - particularly in the building sector - they had retrenched and the work which they had previously outsourced to the Appellant they took back in-house with a resulting loss of turnover for the Appellant. From that point onwards far from being customers for the Appellant they in fact became competitors within the sector in which the Appellant operated - ie the manufacture of small conveyor systems and other engineering equipment for the construction trade.

10. As a result of this decrease in turnover the Appellant had no option but to move to a position where it looked for overseas trade as a way of compensating for the loss of these customers.

11. Mr Mallon explained that he had not appreciated, prior to his preparation for the Tribunal that circumstances such as this might be brought into account in the assessment of whether or not the Appellant had a reasonable excuse for the penalties as levied.

HMRC's Case

12. HMRC's case, as presented by Mr Stockman and Ms Williams was relatively straightforward. In the first place HMRC had indicated that more than sufficient notice had been provided to the Appellant of the penalties as they arose and referred in particular to a warning letter issued on the 27 May 2011 (ie. in the first month of that tax year) with follow up contact on the 4 July, 24 August, 25 October and 29 December to counter the Appellant's assertion that they had not been made aware of the defaults and likely penalties.

13. In terms of the Appellant's assertion that the penalties themselves were unfair HMRC's response was that they had been calculated in accordance with the legislation which provided that where there were increasing numbers of defaults then the penalty would correspondingly increase.

14. Finally HMRC's position was that Anaconda was fundamentally a repeat offender and had a history of poor compliance which dated from 2007 onwards and that HMRC were keen to ensure that the Appellant, as all other traders were obliged to do, complied with their obligations to pay PAYE as and when it fell due and, where there were defaults, to penalise the Appellant in respect of those defaults.

Conclusions

15. May we say at the outset that we find the Appellant's more general observations not particularly compelling. There clearly was a history of default of which the Appellant was aware and which resulted in penalties which we find were correctly calculated in accordance with the legislation. What we have to determine, however, is if the Appellant's case - which in front of the Tribunal essentially boiled down to an insufficiency of funds was sufficient to establish the reasonable excuse defence as set out in paragraph 16(2)(a) of Schedule 56 to the Finance Act 2009 and was attributable to events outside of the Appellant's control.

16. In terms of the evidence provided to the Tribunal we do find that case to be established. We say that for the following reasons. In the first case evidence was produced to us that the Ulster Bank had been putting pressure on the Appellant throughout the tax year in question. The letter which was produced to the Tribunal dated October 2011 restricting the overdraft from £1million to £355,000 with the additional requirement for further monthly reductions of £20,000 per month clearly evidenced what had been on-going dialogue with the Bank and a severe straightening of the company's financial circumstances. That in itself would not, in our view, have constituted reasonable excuse because the Appellant being aware of those circumstances ought to have been able to reorganise its affairs sufficiently to ensure that PAYE was paid to HMRC on a monthly basis as and when it fell due.

17. The factor, however, which persuaded the Tribunal that the Appellant did have a reasonable excuse was the 67% reduction in turnover which came as a result of the termination of two substantial contracts with Powerscreen and McCloskey International. It is true to say that the recession in the building trade has been the worst for a generation. Companies operating in that sector – as the Appellant clearly did – probably suffered most. We were satisfied with the evidence that Mr Mallon gave that the termination of two contracts had a sudden and a material impact upon

the affairs of the company which was entirely beyond its control. The accounts which were produced to us very clearly demonstrated the reduction in turnover over a period of two years by 67% from £6.2million in 2008 to just over £2million in 2010. We find that this inevitably imposed considerable cash straightening upon the finances of the company. That coupled with the restrictions imposed by the Ulster Bank clearly had a material impact which the company was incapable of dealing with immediately. We conclude that those combined factors were outwith the Appellant's control and did constitute a reasonable excuse and, therefore, allow the appeal.

18. 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.

**IAN HUDDLESTON
TRIBUNAL JUDGE**

RELEASE DATE: 23 April 2014