



**TC02422**

**Appeal number: TC/2011/09982**

*TYPE OF TAX – appeal against the penalty imposed for the late payment of PAYE- Schedule 56 Finance Act 2009—appellant claimed to have paid in advance to meet the liability resulting in an overpayment in the previous year – HMRC reallocated the payments as best it could and had considerably reduced the initial penalty however without further evidence of the overpayment could do no more – appeal dismissed with proviso with the agreement of HMRC that if evidence provided of overpayment penalty would be recalculated*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**LONDON HOUSING SOLUTIONS LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE SANDY RADFORD  
ANTHONY HUGHES**

**Sitting in public at Bedford Square, London on 14 September 2012**

**Mr D Singh for the Appellant**

**Mr J Kruyer, Officer of HMRC, for the Respondents**

## DECISION

5 1. This is an appeal against the penalty of £2,934.71 for late payment of PAYE during the tax year 2010/11.

2. After a review of the appellant's case the penalty was reduced by HMRC from £7,145.93. This was as a result of the appellant repeatedly making the payments to an incorrect year and HMRC reallocating them after it was confirmed that the payments were intended for the 2010/11 year.

### 10 **The legislation**

15 3. Penalties for the late payment of monthly PAYE amounts were first introduced for the tax year 2010/11. The legislation is contained in Schedule 56 to the Finance Act 2009 ("Schedule 56"). Schedule 56 covers penalties for non- and late payment of many taxes: paragraph 1(1) (which applies to all taxes) states that a penalty is payable where the taxpayer fails to pay the tax due on or before the due date.

4. Paragraph 6 (which relates only to employer taxes such as PAYE) states that the penalty due in such a case is based on the number of defaults in the tax year, though the first default is ignored. The amount of the penalty varies as provided by subparagraphs (4) to (7):

20 (4) If P makes 1, 2 or 3 defaults during the tax year, the amount of the penalty is 1% of the amount of tax comprised in the total of those defaults.

(5) If P makes 4, 5 or 6 defaults during the tax year, the amount of the penalty is 2% of the amount of tax comprised in the total amount of those defaults.

25 (6) If P makes 7, 8 or 9 defaults during the tax year, the amount of the penalty is 3% of the amount of tax comprised in the total amount of those defaults.

(7) If P makes 10 or more defaults during the tax year, the amount of the penalty is 4% of the amount of tax comprised in those defaults.

In this and other paragraphs of Schedule 56 "P" means a person liable to make payments.

30 5. Under paragraph 11 of Schedule 56 HMRC is given no discretion over levying a penalty:

11(1) Where P is liable to a penalty under any paragraph of this Schedule HMRC must –

35 (a) assess the penalty,

(b) notify P, and

(c) state in the notice the period in respect of which the penalty is assessed.

(3) An assessment of a penalty under any paragraph of this Schedule—

- (a) is to be treated for procedural purposes in the same way as an assessment to tax (except in respect of a matter expressly provided for by this Schedule),
- (b) may be enforced as if it were an assessment to tax, and
- (c) may be combined with an assessment to tax.

5 6. Paragraphs 13 to 15 of Schedule 56 deal with appeals. Paragraph 13(1) allows an appeal against the HMRC decision that a penalty is payable and paragraph 13(2) allows for an appeal against the amount of the penalty. Paragraph 15 provides the Tribunal's powers in relation to an appeal which is brought before it:

10 (1) On an appeal under paragraph 13(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 13(2) that is notified to the tribunal, the tribunal may-

- (a) affirm HMRC's decision, or
- (b) substitute for HMRC's decision another decision that HMRC had the power to make.

15 (3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 9-

- (a) to the same extent as HMRC...[...],or
- (b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 9 was flawed.

20 7. Paragraph 9 (referred to in paragraph 15) states:

(1) If HMRC think it right because of special circumstances, they may reduce the penalty under any paragraph of this Schedule.

(2) In sub-paragraph (1) "special circumstances" does not include –

- (a) ability to pay, or
- (b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to-

- (a) staying a penalty, and
- (b) agreeing a compromise in relation to proceedings for a penalty.

35 8. Paragraph 16 contains a defence of reasonable excuse, but an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control. Nor is it such an excuse where P relies on another person to do anything unless P took reasonable care to avoid the failure; and where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the

excuse if the failure is remedied without unreasonable delay after the excuse has ceased.

### **Background and Facts**

9. In the previous tax year 2009/10 the appellant overpaid by £12,366.35.

#### **5 Appellant's submissions**

10. The appellant contended that payments were made in advance to meet the liability. The appellant contended that HMRC had ignored the fact that payments were made in advance and penalties had been raised because the payments were made after the due date although these were payments on account and the account was in credit.

#### **HMRC's submissions**

11. HMRC submitted that the payments were not made in advance as submitted by the appellant but that there was an overpayment in the previous year. The appellant had then wrongly allocated 10 months worth of payments to the wrong year.

15 12. Mr Kruyer submitted that HMRC had allocated the payments as best they could using the payment figures supplied by the appellant and the receipts clearing system records that showed when the appellant made the payment and to what month and year.

20 13. He submitted that HMRC had frequently tried to contact the appellant during the year to discuss the payments and although messages had been left none of the calls were returned. Had these calls been returned there would have been an opportunity for HMRC to warn of the penalties and discuss the overpayments for the previous years.

25 14. He submitted that until the appellant could supply evidence regarding the amounts actually due, HMRC could not be sure that the seeming overpayment was actually an overpayment.

15. Mr Kruyer submitted that if the evidence was supplied and could be confirmed as an overpayment then HMRC would recalculate the penalty.

#### **Findings**

30 16. The Tribunal found that whilst the appellant had clearly made some overpayments Mr Singh was unable to provide any further evidence concerning these which he said had been made electronically.

35 17. The Tribunal found that the appeal had been made in November 2011 prior to the HMRC review which had accepted that there had been overpayments and had considerably reduced the original penalty charged.

18. The Tribunal found that HMRC had done its best to assist the appellant in reallocating the payments but without further evidence were unable to do any more.

19. The Tribunal found that in light of the absence of evidence which showed that the appellant's account was in credit it had to rely on the fact that eight of the PAYE payments in the year 2010/11 were made late and the appellant had no reasonable excuse.

### **Decision**

20. The appeal is dismissed and the penalty of £2,934.71 is hereby confirmed but should the appellant provide the necessary evidence showing that the appellant's account is in credit then HMRC are to recalculate the penalty as agreed by HMRC.

21. 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.

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**SANDY RADFORD  
TRIBUNAL JUDGE**

**RELEASE DATE: 27 November 2012**