



TC01546

Appeal number TC/2011/05498

Penalty – late payment of PAYE and NICs payments – FA 2009, Sch 56 - operation of the scheme of penalties - whether lack of specific warning a reasonable excuse – no - whether any special circumstances existed to justify a reduction in the penalty amount – no - whether appellant’s human rights infringed – no - appeal dismissed

FIRST-TIER TRIBUNAL

TAX

DINA FOODS LIMITED

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S
REVENUE AND CUSTOMS**

Respondents

**TRIBUNAL: JUDGE ROGER BERNER
JOHN WHITING CTA FCA (Member)**

Sitting in public at 45 Bedford Square, London WC1 on 13 October 2011

Mr Bobby Kaye, Cecil Kaye & Co for the Appellant

Miss E Gardiner, assisted by Mrs G Orimoloye, of HM Revenue and Customs, for the Respondents

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DECISION

Introduction

1. This case concerns an appeal against a penalty for late payment of PAYE payments and national insurance contributions (NICs). The penalty under appeal amounts to £10,247.61. In this decision, where we refer to late payments of PAYE, those references apply equally to the late payments of NICs.

2. The appellant company was represented by Mr Bobby Kaye, of Cecil Kaye & Co; HMRC's case was presented by Miss E Gardiner, assisted by Mrs G Orimoloye.

3. The Tribunal had in advance Dina Foods Ltd's Notice of Appeal, including a schedule from HMRC showing that they considered Dina Foods Ltd were late with all their PAYE payments for 2010-11, but no further papers. On the day of the hearing, HMRC produced a helpful bundle of papers, including extracts from their call logs, copy correspondence, relevant legislation and copies of HMRC notices. However, this bundle was only made available to the Tribunal and to Mr Kaye on the day of the hearing. Thus, Mr Kaye had only limited time to study the material and was unable to check certain points with his client in advance of the actual hearing. The Tribunal asked Mr Kaye whether he had had enough time to consider the material; he confirmed to the Tribunal that although he would have liked the material in advance, he was content to proceed with the appeal on schedule. The Tribunal therefore confirmed that it was in the interests of justice that the appeal should proceed as scheduled.

The legislation

4. The legislation in question is relatively new and this may well be the first case on it to come before the Tribunal. The provisions came out of a comprehensive review of HMRC's powers and the penalties available to them. Introducing a penalty for late payment of PAYE was a new step: historically there has been no penalty for late paid PAYE as such.

5. The legislation is contained in Finance Act 2009, Schedule 56. The relevant paragraphs which lay down the structure of the penalty for PAYE are as follows:

Penalty for failure to pay tax

- 1 (1) A penalty is payable by a person ("P") where P fails to pay an amount of tax specified in column 3 of the Table below on or before the date specified in column 4.
- (2) Paragraphs 3 to 8 set out—
- (a) the circumstances in which a penalty is payable, and
- (b) subject to paragraph 9, the amount of the penalty.
- (3) If P's failure falls within more than one provision of this Schedule, P is liable to a penalty under each of those provisions.

(4) In the following provisions of this Schedule, the “penalty date”, in relation to an amount of tax, means the date on which a penalty is first payable for failing to pay the amount (that is to say, the day after the date specified in or for the purposes of column 4 of the Table).

	<i>Tax to which payment relates</i>	<i>Amount of tax payable</i>	<i>Date after which penalty is incurred</i>
PRINCIPAL AMOUNTS			
1	Income tax or capital gains tax	Amount payable under section 59B(3) or (4) of TMA 1970	The date falling 30 days after the date specified in section 59B(3) or (4) of TMA 1970 as the date by which the amount must be paid
2	Income tax	Amount payable under PAYE regulations	The date determined by or under PAYE regulations as the date by which the amount must be paid

5 (The table continues, listing many other taxes.)

Amount of penalty: PAYE and CIS amounts

5 (1) Paragraphs 6 to 8 apply in the case of a payment of tax falling within item 2 or 4 in the Table.

10 (2) But those paragraphs do not apply in the case of a payment mentioned in paragraph 3(1)(b) or (c).

6—

(1) P is liable to a penalty, in relation to each tax, of an amount determined by reference to—

15 (a) the number of defaults that P has made during the tax year (see sub-paragraphs (2) and (3)), and

(b) the amount of that tax comprised in the total of those defaults (see sub-paragraphs (4) to (7)).

20 (2) For the purposes of this paragraph, P makes a default when P fails to make one of the following payments (or to pay an amount comprising two or more of those payments) in full on or before the date on which it becomes due and payable—

(a) a payment under PAYE regulations;

25 (b) a payment of earnings-related contributions within the meaning of the Social Security (Contributions) Regulations 2001 ([SI 2001/1004](#));

(c) a payment due under the Income Tax (Construction Industry Scheme) Regulations 2005 ([SI 2005/2045](#));

30 (d) a repayment in respect of a student loan due under the Education (Student Loans) (Repayments) Regulations 2009 ([SI 2009/470](#)) or the Education (Student Loans) (Repayments) Regulations (Northern Ireland) 2000 (S.R. 2000 No 121).

(3) But the first failure during a tax year to make one of those payments (or to pay an amount comprising two or more of those payments) does not count as a default for that tax year.

- (4) If P makes 1, 2 or 3 defaults during the tax year, the amount of the penalty is 1% of the amount of the tax comprised in the total of those defaults.
- 5 (5) If P makes 4, 5 or 6 defaults during the tax year, the amount of the penalty is 2% of the amount of the tax comprised in the total of those defaults.
- (6) If P makes 7, 8 or 9 defaults during the tax year, the amount of the penalty is 3% of the amount of the tax comprised in the total of those defaults.
- 10 (7) If P makes 10 or more defaults during the tax year, the amount of the penalty is 4% of the amount of the tax comprised in the total of those defaults.
- (8) For the purposes of this paragraph—
 - 15 (a) the amount of a tax comprised in a default is the amount of that tax comprised in the payment which P fails to make;
 - (b) a default counts for the purposes of sub-paragraphs (4) to (7) even if it is remedied before the end of the tax year.
 - (9) The Treasury may by order made by statutory instrument make such amendments to sub-paragraph (2) as they think fit in consequence of any amendment, revocation or re-enactment of the regulations mentioned in that sub-paragraph.
- 20

6. It is worth noting that under paragraph 11, HMRC is given no discretion over levying a penalty, given the use of the word ‘must’:

- 25 11(1) Where P is liable for a penalty under any paragraph of this Schedule HMRC must—
 - (a) assess the penalty,
 - (b) notify P, and
 - 30 (c) state in the notice the period in respect of which the penalty is assessed.

7. The legislation does allow a measure of discretion to HMRC, but only in ‘special circumstances’. Paragraph 9 provides:

Special reduction

- 35 9(1) If HMRC think it right because of special circumstances, they may reduce a 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.

5 8. There is also provision for an appeal process in paragraphs 13 to 15, the Tribunal’s powers being laid down in paragraph 15:

15(1) On an appeal under paragraph 13(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.

10 (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 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 (which may mean applying the same percentage reduction as HMRC to a different starting point), or

20 (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.

(4) In sub-paragraph (3)(b) “flawed” means flawed when considered in the light of the principles applicable in proceedings for judicial review.

(5) In this paragraph “tribunal” means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 14(1)).

25 9. It will be observed that the Tribunal is given power to confirm or cancel the penalty, or substitute for HMRC’s decision another decision, but only one that HMRC had the power to make. The Tribunal can only rely upon the “special circumstances” provision in para 9 to a different extent than that applied by HMRC if it thinks that HMRC’s decision in that respect was flawed. Applying judicial review principles, the
30 Tribunal must consider whether HMRC acted in a way that no reasonable body of commissioners could have acted, or whether they took into account some irrelevant matter or disregarded something to which they should have given weight. The Tribunal should also consider whether HMRC have erred on a point of law.

35 10. Paragraph 16 contains a defence of reasonable excuse, with some particular express exclusions:

16—

(1) If P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for a failure to make a payment-

40 (a) liability to a penalty under any paragraph of this Schedule does not arise in relation to that failure, and

(b) the failure does not count as a default for the purposes of paragraph 6 ...

(2) For the purposes of sub-paragraph (1)—

5 (a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control,

(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and

10 (c) 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 ceased.

15 11. The legislation became operative under SI 2010/466, the Finance Act 2009, Schedule 56 (Appointed Day and Consequential Provisions) Order, with a commencement date of 6 April 2010. Thus, the first time penalties could be raised under these rules was after the end of the 2010/11 tax year, given the way that the penalties talk in terms of the number of defaults during the year in question.

20 12. The parallel statutory authority for the levying of the corresponding penalties for late payment of NICs is set out in regs 67A and 67B (inserted with effect from 2010/11) of the Social Security Contributions Regulations 2001 (SI 2001/1004). This lays down that Schedule 56 is applied to Class 1, Class 1A and Class 1B contributions. There was nothing in HMRC's paperwork to indicate how the liability to a penalty on the NICs amount arose; we suggest that this should be made clear to
25 an appellant on any appeal.

The penalty notice

30 13. Dina Foods Ltd is a company that supplies Mediterranean foods. It received a penalty notice from HMRC dated 13 June 2011, marked as received by the company on 20 June 2011, stating that as it had not paid one or more of its PAYE payments for 2010/11 on time, HMRC were charging the company a penalty. The letter included a schedule of the company's monthly PAYE payments, including both tax and NICs, for the year 2010/11 and the penalty amounts, though this did not state the dates of payment. The penalty was calculated at 4% of the company's late paid PAYE and
35 NICs due for the year (ignoring the first default) of £276,316, leading to a penalty of £10,247.61, though there is no explanation of the calculation, or even the rationale for the 4% rate, in the letter.

40 14. Dina Foods Ltd wrote to HMRC on 21 June 2011 appealing against the penalty, citing grounds including their not being formally informed about the new penalty system and the lack of any notification of the individual late payments and the consequences.

Submissions for Dina Foods Ltd

15. Mr Kaye's arguments centred on the lack of warning from HMRC to his client of the build up of the penalty. He contended that this lack of warning gave the company a reasonable excuse for its failure. In doing so, he drew an unfavourable comparison with the VAT Default Surcharge system that has a system of a warning letter and escalating penalties.

16. Mr Kaye drew the Tribunal's attention to an extract from the HMRC Employers' Bulletin, issued in April 2010. He pointed in particular to the penultimate paragraph, which said:

10 "[HMRC] will not routinely send reminders but on the first occasion that it appears a payment is late many employers will get a letter saying that if they pay late again they may get a penalty."

17. Mr Kaye stressed that his client had never received any warning letter along the lines alluded to in the paragraph. He also questioned whether HMRC had properly publicised the new penalties, commenting that his firm had not been invited to briefing seminars by HMRC as they had been for various other developments.

18. Mr Kaye considered that the amount of the penalty, being 4% of the PAYE due for the year, was excessive and argued that for a first offence HMRC should have levied a lower penalty. He pointed to the Employers' Bulletin that said "...the amount of the penalty varies from 1-4% of the late amount...". In support of this contention he also referred to the company's cash flow problems: they had negotiated a time to pay arrangement with HMRC in the past but were now aware of the need to pay on time and were doing so.

19. In discussion of the schedule provided by HMRC in the bundle of papers of the company's PAYE payment dates, Mr Kaye was unable to accept the dates of payment that were listed as he had not been able to check the details with his client. This schedule shows payments made between 4 and 84 days late.

Submissions for HMRC

20. Miss Gardiner took the Tribunal through the relevant legislation. She then addressed the issue of publicity for the new penalty regime. She argued that HMRC had given the new PAYE penalties wide publicity. HMRC believed that no responsible employer, aware of their general PAYE responsibilities, could miss all of the various communications. In support of this, she referred to various extracts from the HMRC website that deal with PAYE, including specific headings about late payment penalties, together with Employers' Bulletins of April and August 2010. Copies of all these were included in the bundle of papers provided to the Tribunal and to Mr Kaye.

21. Miss Gardiner then referred us to extracts from HMRC's records of dealings with Dina Foods Ltd, copies of which were also contained in the bundle of papers. These included:

- A record stating that on 29 June 2010 a ‘penalty default letter’ was issued, following a telephone conversation with the company on 28 June 2010
- On 26 August 2010 a form P101 (Notice requiring payment of PAYE/NIC) was issued, following a telephone call
- 5 - Further P101s were issued on 25 June 2010, 25 January and 28 April 2011 with various telephone calls, including one on 11 January 2011 which records “Spoke to Mr Haddad (MD). I advised that m8 payment not yet received; he advised that payment of £26,893.24 sent in 6 January 2011. I advised that payments should be made on time.” (Miss Gardiner pointed out that ‘m8’
10 means month 8 of the tax year, i.e. November 2010.)

22. Miss Gardiner’s contention was that considerable contact had been made with Dina Foods Ltd, though she accepted that most of this was in terms of chasing payment. Referring to Mr Kaye’s reference to the Employers’ Bulletin of April 2010, she argued that no reminders were promised, but that HMRC had in fact sent three in
15 the year.

23. Miss Gardiner submitted that the PAYE penalty is automatic in nature and follows from the number of defaults. The only discretion was in terms of paragraph 9 and ‘Special circumstances’; there had been an internal HMRC review which found no reason for using this provision.

20 **Findings of fact**

24. From the documentary and oral evidence we find the following facts.

25. PAYE and NIC amount have been paid late by the company during 2010/11. This is not disputed, although the exact extent of lateness for each payment is not something that could be agreed due to Mr Kaye’s inability to verify the dates on
25 HMRC’s schedule. This schedule shows payments made between 4 and 84 days late during 2010/11. As Mr Kaye was unable to accept the dates on this schedule, for reasons explained above, we make no finding of fact over the exact dates of the monthly payments. However, we have no reason to doubt the HMRC schedule and we are satisfied that this demonstrates, together with the evidence of the extracts from the
30 HMRC call log, that the company habitually paid its PAYE late during 2010/11. The nature of the PAYE penalty does not mean that the number of days late of a particular payment is relevant; once a payment is a day late, it is ‘on the register’ for the penalty for the year.

26. We do, however, note that the penalty notice letter of 13 June 2011 included a
35 schedule of the company’s PAYE payments during 2010/11, showing that all 11 had been paid late (there was no PAYE due for month 2) albeit without the payment dates recorded by HMRC on their system or included in the schedule provided in HMRC’s bundle. Thus the company were notified of HMRC’s belief that they had made all 11 payments late and had time to prepare arguments and evidence that one or more of the
40 payments was not late. None of the correspondence between the parties or the

grounds of appeal suggests that Dina Foods Ltd had at any time disputed that the payments were late. We note that the company's letter of 21 June 2011, following the receipt of HMRC's penalty notice, accepts that "...all PAYE for the year 2010/11 has been paid albeit with little delay...". We are therefore satisfied, and we find as a fact, that the PAYE and NICs payments set out in HMRC's schedule were made late.

27. We considered the evidence and contentions around the introduction of the new PAYE penalties. We find that HMRC publicised the late payment penalties for PAYE and NICs extensively both before and after they came into effect. An employer pack including a CD-ROM was mailed to all employers in February 2010, flyers were mailed to employers and factsheets were distributed at face to face events (such as "Employer Talk" and published on the HMRC website. Late payment penalties also featured in issues of Employer Bulletin, on the PAYE pages of the website (and on a podcast), on Businesslink and in published guidance and employer help books. There was also communication with accountants and other tax agents, and publication in local and national media.

28. The HMRC log shows that a 'Late payment warning' was sent to Dina Foods Ltd in June 2010. The HMRC system does not contain copies of the actual letter sent to an employer but we were shown a copy of the standard letter that would be used. Mr Kaye stated that his client had never received this warning letter, nor the various P101 letters chasing payment of PAYE (copies of which similarly are not on HMRC's system). We find this non-receipt unlikely, particularly as the company clearly received the penalty notice letter of 13 June 2011 and subsequent correspondence. With due respect to Mr Kaye's vigorous contention, we have heard no explanation of why they seem to have not been received. On the balance of probabilities, we find that the various notices and letter were properly issued by HMRC.

29. We also find that Dina Foods Ltd was contacted regularly by HMRC during the year about late payment of PAYE. Mr Kaye did question the substance of these contacts but we are satisfied that HMRC was in contact with the company about late payment, though we accept that there is no evidence one way or another about penalties being mentioned in the conversations.

30. Finally, we were shown schedules compiled by HMRC showing that Dina Foods Ltd habitually made late payments of PAYE and NICs in 2008/09 and 2009/10. These schedules were not disputed, and we accordingly find that they accurately reflect the payment record of Dina Foods Ltd for those tax years.

35 **Discussion and conclusions**

31. The legislation on PAYE penalties is clear. As we have described, except in the case of special circumstances, the scheme laid down by the statute gives no discretion: the rate of penalty is simply driven by the number of PAYE late payments in the tax year by the employer. A company that makes 11 late payments in the year will fall into the 4% penalty rate.

32. Dina Foods Ltd paid 11 of its PAYE payments late during the year. Accordingly the 4% rate of penalty applies. What could affect the quantum of the penalty is the possibility of showing a reasonable excuse for one or more of the individual monthly late payments. A reasonable excuse will eliminate liability for the default or defaults in question. The result could also be that the number of late payments for the year reduces and so means a 3% (or lower) rate applies. We did ask Mr Kaye about this; he could not suggest any particular reason for any of the late payments. Nor had the company suggested any reason to HMRC during the year or in subsequent correspondence.

33. The scheme of the PAYE legislation requires taxpayers to pay over PAYE on time. The legislation does not require HMRC to issue warnings to individual employers, though it would be expected that a responsible tax authority would issue general material about the new system. This HMRC did; in our view, the absence of specific warnings to Dina Foods Ltd about the consequences of failing to pay on time does not constitute a reasonable excuse for any of the late payments.

34. With respect to Mr Kaye's argument on the lack of any warning from HMRC that the penalty was building up, the comparison he drew with the VAT Default Surcharge system may be apt, but only in the sense that both seek to encourage a taxpayer to pay on time and penalise him if he does not. However, the comparison only goes so far. Parliament decided on a different system for PAYE, possibly because of the monthly schedule that usually applies to PAYE payments. But even though there is no provision for a formal warning, Schedule 56 does exclude the first default from the penalty regime.

35. Schedule 56 does allow HMRC some limited discretion, under paragraph 9, to allow a 'special reduction'. We accept that HMRC did consider this by means of their internal review process. The conclusion reached was that no special circumstances existed. We can therefore only apply a reduction on account of special circumstances if we find that HMRC's decision in this respect was flawed on the judicial review principles we outlined earlier.

36. Ability (or perhaps more relevantly, inability) to pay does not constitute special circumstances. Accordingly, the plea advanced by the company in correspondence and by Mr Kaye about the impact on the business's cash flow of the penalty cannot help them.

37. Having considered all the evidence and material before us we can find no special circumstances that would justify a reduced penalty. This is a company that has habitually paid its PAYE late. We do not consider that the lack of awareness of Dina Foods Ltd of the penalty regime is capable of constituting a special circumstance. In any event, having considered the evidence of the information provided by HMRC concerning the introduction of the PAYE and NICs penalties, we are of the view that 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.

38. In this context we have a number of observations to make concerning the scheme of Schedule 56 as a whole, as it applies to PAYE and NICs payments. The penalty regime is based on the number of defaults over a complete tax year. There is no separate penalty for each individual default; the penalty can only be assessed once the
5 aggregate of the late paid tax comprised in the total of the defaults for a particular tax year has been ascertained. A taxpayer who continues to pay late, so increasing both the amount of tax (and NICs) on which the penalty may be levied and the rate of the penalty, may well complain that his behaviour (and thus the amount of his liability) would have been different had a penalty been levied in respect of a default early in the
10 tax year or at least a warning issued. But on the scheme of penalties that has been laid down, the total would not then have been capable of being ascertained, so the penalty could not at that earlier time have been assessed.

39. We do not therefore consider that any failure on the part of HMRC to issue warnings to defaulting taxpayers, whether in respect of the imposition of penalties or
15 the fact of late payment, is of itself capable of amounting either to a reasonable excuse or special circumstances.

40. In its initial appeal letter and in its formal notice of appeal, the company referred to the penalty being excessive. It is clearly not excessive on the terms of Schedule 56
20 itself because the system laid down prescribes the penalties. Nonetheless, whilst no specific argument was addressed to us on proportionality, we have considered whether, in the circumstances of this case, the 4% penalty that was levied on the total of the relevant defaults in the tax year can be said to be disproportionate.

41. The issue of proportionality in this context is one of human rights, and whether, in
25 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
30 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.

35 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
40 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.

5 43. In summary, we find that:

(1) The penalty has been properly levied in relation to the late payment defaults of Dina Foods Ltd in the tax year 2010/11.

(2) Dina Foods Ltd does not have a reasonable excuse for any of the failures to pay PAYE and NICs amounts on time.

10 (3) HMRC's decision that there are no special circumstances was not flawed.

(4) The penalty was not excessive or disproportionate.

Decision

15 44. For the reasons we have given, we dismiss this appeal. The penalty of £10,247.61 is therefore confirmed.

Application for permission to appeal

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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ROGER BERNER

TRIBUNAL JUDGE

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RELEASE DATE: 5 NOVEMBER 2011