



**TC01719**

**Appeal number TC/2011/06529**

*Penalty – late payment of PAYE and NICs (FA 2009 Sch 56) – Whether a reasonable excuse for late payment – No – Whether “special circumstances” justifying a special reduction – No – Appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX**

**ST JOHN PATRICK PUBLISHERS LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: DR CHRISTOPHER STAKER (Tribunal Judge)  
MR IAN ABRAMS (Tribunal Member)**

**Sitting in public in London on 8 December 2011**

**Mr Dilip Chauhan of the Appellant**

**Ms Karen Weare for the Respondents**

## DECISION

### Introduction

1. This is an appeal against a penalty of £8,290.76 imposed under Schedule 56 of the Finance Act 2009 (“Schedule 56”) in respect of the late payment by the Appellant of monthly payments of PAYE and National Insurance contributions (“NICs”) in 11 months of the year ending 5 April 2011.

### The relevant legislation

2. Paragraph 1 of Schedule 56 states in relevant part as follows:

- (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).
- (5) Sub-paragraph (4) is subject to paragraph 2A.

	<i>Tax to which payment relates</i>	<i>Amount of tax payable</i>	<i>Date after which penalty is incurred</i>
<i>PRINCIPAL AMOUNTS</i>			
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
3	Income tax	Amount shown in return under section 254(1) of FA 2004	The date falling 30 days after the date specified in section 254(5) of FA 2004 as the date by which the amount must be paid

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The table then proceeds to list numerous other categories of taxes.

3. Regulations 67A and 67B of the Social Security Contributions Regulations (SI 2001/1004 as amended) provide that Schedule 56 applies also to Class 1 National Insurance contributions as if they were an amount of tax falling within item 2 of the above Table, and to Class 1A and Class 1B National Insurance contributions as if they were an amount of tax falling within item 3 of the above Table.

4. Paragraph 5 of Schedule 56 states that paragraphs 6 to 8 of Schedule 56 apply in the case of a payment of tax falling within item 2 or 4 in the Table.

5. Paragraph 6 of Schedule 56 states in relevant part as follows:

- 10 (1) P is liable to a penalty, in relation to each tax, of an amount determined by reference to—
- (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
- 15 (see sub-paragraphs (4) to (7)).
- (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—
- 20 (a) a payment under PAYE regulations;
  - (b) a payment of earnings-related contributions within the meaning of the Social Security (Contributions) Regulations 2001 (SI 2001/1004);
- ...
- 25 (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
- 30 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 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
- 35 penalty is 3% of the amount of the tax comprised in the total 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 the tax comprised in the total of those defaults.

(8) For the purposes of this paragraph—

5 (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.

...

10 6. Paragraph 9 of Schedule 56 states as follows:

(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

15 (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

20 (b) agreeing a compromise in relation to proceedings for a penalty.

7. Paragraph 10 of Schedule 56 states as follows:

(1) This paragraph applies if—

25 (a) P fails to pay an amount of tax when it becomes due and payable,

(b) P makes a request to HMRC that payment of the amount of tax be deferred, and

(c) HMRC agrees that payment of that amount may be deferred for a period (“the deferral period”).

30 (2) If P would (apart from this sub-paragraph) become liable, between the date on which P makes the request and the end of the deferral period, to a penalty under any paragraph of this Schedule for failing to pay that amount, P is not liable to that penalty.

(3) But if—

- (a) P breaks the agreement (see sub-paragraph (4)), and
  - (b) HMRC serves on P a notice specifying any penalty to which P would become liable apart from sub-paragraph (2),
- P becomes liable, at the date of the notice, to that penalty.

- 5 (4) P breaks an agreement if—
- (a) P fails to pay the amount of tax in question when the deferral period ends, or
  - (b) the deferral is subject to P complying with a condition (including a condition that part of the amount be paid during the deferral period) and P fails to comply with it.
- 10 (5) If the agreement mentioned in sub-paragraph (1)(c) is varied at any time by a further agreement between P and HMRC, this paragraph applies from that time to the agreement as varied.

8. Paragraph 16 of Schedule 56 states as follows:

- 15 (1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a payment if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.
- (2) For the purposes of sub-paragraph (1)—
- 20 (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
- 25 (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.

9. Paragraphs 13-15 of Schedule 56 provide for appeals to the Tribunal against a decision of HMRC that a penalty is payable, or against a decision by HMRC as to the amount of the penalty that is payable. To the extent that the appeal relates to the amount of the penalty payable, paragraph 15(2)(b) provides that the Tribunal may substitute for HMRC's decision another decision that HMRC had power to make.

10. The operation of Schedule 56 was recently considered in *Dina Foods Ltd v Revenue & Customs* [2011] UKFTT 709 (TC) ("*Dina Foods*"). It was said by the Tribunal in that case amongst other matters that:

- (1) the legislation became operative with a commencement date of 6 April 2010, so that 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 (at [11]);
- 5 (2) 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 (at [31]);
- (3) 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 (at [33]);
- 10 (4) lack of awareness of the penalty regime is not capable of constituting a special circumstance; in any event, 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 (at [37]);
- 15 (5) any failure on the part of HMRC to issue warnings to defaulting taxpayers, whether in respect of the imposition of penalties or the fact of late payment, is not of itself capable of amounting either to a reasonable excuse or special circumstances (given that there is no separate penalty for each individual default, and the penalty can only be assessed once the aggregate of the late paid tax comprised in the total of the defaults for a particular tax year has been ascertained) (at [38]-[39]);
- 20 (6) the penalty imposed in that case was not disproportionate (at [40]-[42]).

## 25 **The hearing, evidence and arguments**

11. At the hearing, the Appellant was represented by Mr Chauhan, the financial controller of the Appellant. HMRC was represented by Ms Weare.

12. It is not in dispute between the parties that the Appellant was required throughout the relevant year to make monthly payments of PAYE and NICs by the 19<sup>th</sup> day of each month.

13. The HMRC bundle produced for the hearing included at page C2 a table showing amounts of PAYE tax and NICs required to be paid by the Appellant in each of the months of the year to which this appeal relates, and the dates on which each of the relevant amounts was actually paid. At the hearing, Mr Chauhan indicated on behalf of the Appellant that he did not dispute these details. According to this table, the payments were made after the 19<sup>th</sup> of the month in all of the relevant months.

14. The evidence of Mr Chauhan was as follows. Someone at the Appellant company would always ring HMRC before the due date if the Appellant was not able to pay the PAYE and NICs by the due date, to ask if payment could be deferred. A deferment

date would be agreed. At no point was the Appellant company informed that penalties would apply. There were occasions on which the Appellant was informed that penalties “may” apply. The Appellant has no records of these conversations with HMRC, but they would have been on the 18<sup>th</sup> or 19<sup>th</sup> of each relevant month.

5 15. The case for HMRC was as follows.

16. The amount of the penalty originally imposed was £9,140. This had been reduced to £8,290.76, as a result of the exclusion from consideration of the late payment in month 12. This is because it was now accepted the due date for payment in respect of month 12 in fact fell outside the relevant tax year.

10 17. Avoidance of liability to a penalty by an agreement under paragraph 10 of  
Schedule 56 is only possible if the agreement is entered into before the trigger date for  
the penalty and if payment is made by the due date pursuant to the agreement.  
Evidence in the form of HMRC computer records indicates that in each of the relevant  
months, the Appellant only contacted HMRC after the due date for the payment, with  
15 the exception of month 6 (October 2010). However, in month 6, payment was made  
after the agreed date for payment, so that paragraph 10 also does not apply to that  
month.

18. HMRC computer records also indicate that on 28 May 2010, a standard penalty  
default letter was issued to the Appellant, warning the Appellant that it was in default  
20 in respect of month 1 and that penalties may apply if payment is made late more than  
once in a tax year, advising that the Appellant must pay any overdue PAYE  
immediately and make any future payments on time, and giving internet addresses at  
which further information could be obtained about the penalty regime and time to pay  
agreements. HMRC computer records also indicate that the Appellant was advised in  
25 a telephone conversation on 26 May 2010 that penalties may apply if payment was  
late in future.

19. In reply, Mr Chauhan stated that he did not agree with what HMRC said were the  
dates on which the telephone conversations were held. He said that he knew that each  
of the conversations was on or before the 19<sup>th</sup> of each month. He said that the  
30 company was not told in telephone conversations even that it “may” be liable to  
penalties, because if it had, it would certainly have asked what was meant by penalties  
“may” apply. He said that it was never explained in telephone conversations how the  
penalty regime worked or what would happen. Mr Chauhan could not confirm  
whether the 28 May 2010 warning letter was received, but said that if it was, the  
35 Appellant’s director would have called HMRC immediately, as the director preferred  
direct personal communication. Mr Chauhan did not himself recall receiving such a  
letter. Mr Chauhan did not seek to dispute the dates that the payments were received  
by HMRC. He indicated that he would have to look up his cheque book to determine  
the dates that the cheques were sent. The Tribunal noted that dates recorded in the  
40 chequebook would not necessarily be a reliable indication of when the cheques were  
actually sent or received. Mr Chauhan did not apply for permission to present  
additional evidence of the dates recorded in his chequebook.

## The Tribunal's findings

20. The Tribunal finds, consistently with *Dina Foods*, that:

- 5 (1) the scheme laid down by the statute gives no discretion (subject to paragraph 9): the rate of penalty is simply driven by the number of PAYE late payments in the tax year by the employer;
- (2) 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;
- 10 (3) lack of awareness of the penalty regime is not capable of constituting a special circumstance; in any event, 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;
- 15 (4) any failure on the part of HMRC to issue warnings to defaulting taxpayers, whether in respect of the imposition of penalties or the fact of late payment, is not of itself capable of amounting either to a reasonable excuse or special circumstances.

21. The Appellant did not seek to argue that the penalty regime under Schedule 56 was disproportionate, either for purposes of the European Convention on Human Rights or for other purposes. For completeness, the Tribunal would note that it would 20 in any event consider the findings in paragraphs 40-42 of *Dina Foods* to be relevantly applicable to the circumstances of the present case.

22. The Tribunal must make its findings of fact on the basis of the evidence before it. Where evidence conflicts, the Tribunal must decide which evidence to prefer, 25 weighing such matters as the relative reliability of competing items of evidence, in order to make findings of fact on the balance of probability.

23. In relation to the dates on which the Appellant company made contact with HMRC, and the deferred dates for payment agreed in those telephone calls, the evidence of Mr Chauhan conflicts with the HMRC evidence. The Tribunal takes into 30 account that Mr Chauhan did not claim to have made all of the telephone calls personally, and the HMRC records suggest that he was not a party to most of the telephone calls. Mr Chauhan said that he was sure that each phone call was made before the 19<sup>th</sup> of the month, but he had no contemporaneous notes or other written evidence of the telephone calls, and could only give very general details about them. 35 On the other hand, the HMRC computer records were contemporaneous records of the conversations. They give precise details of dates and times of phone calls. While the details they give of the content of the telephone calls are brief, and often contain abbreviations that are difficult to understand, the Tribunal finds that they are more reliable evidence than that of Mr Chauhan in relation to dates and times of calls, and 40 at least the essentials of what was said in the calls.

24. On the basis of the HMRC evidence, the Tribunal is satisfied that the dates of the telephone calls, and the agreed deferred dates for payment, are as set out on page 6 of Ms Weare's speaking notes that were provided at the hearing to the Tribunal. The Tribunal finds that no telephone call was made in respect of month 3 (July 2010). In  
5 all other relevant months other than month 6 (October 2010), the telephone call was made after the due date for payment. In month 6, although the telephone call was made before the due date (on 15 October 2010), the agreed deferred date was 11 November 2010. The Appellant has not sought to dispute that payment that month was not received by HMRC until 17 November 2010. The Tribunal therefore finds  
10 that paragraph 10 of Schedule 56 is not applicable in this case.

25. The Tribunal finds that the fact that an appellant contacted HMRC *after* the due date in order to request time to pay cannot of itself amount to a reasonable excuse for purposes of paragraph 16 of Schedule 56. The effect of paragraph 16, like paragraph 10, is to remove all liability to a penalty in the circumstances to which it applies. If  
15 contacting HMRC *after* the due date to request time to pay could of itself be a reasonable excuse, the practical effect would be to remove an express requirement of paragraph 10 (the requirement that a request for time to pay must be made *before* the due date). For similar reasons, where a time to pay agreement is entered into before the due date, but payment is made only after the agreed deferred deadline, the  
20 Tribunal does not consider that the fact of the time to pay agreement can of itself amount to a reasonable excuse. This would similarly have the practical effect of removing an express requirement of paragraph 10 (the requirement that payment must be made within the agreed deferred deadline).

26. The Tribunal has considered whether the fact that an appellant has entered into a time to pay agreement with HMRC, and has ultimately paid the relevant amount, could of itself amount to a special circumstance for purposes of paragraph 9 of  
25 Schedule 56, even if the agreement was not requested until after the statutory deadline for payment, or even if the payment was not made until several days after the agreed deferred deadline. While such circumstances may not be sufficient to remove all liability to a penalty under paragraphs 10 or 16, it could be argued that such  
30 circumstances might justify at least a reduction in the penalty under paragraph 9, on the basis that the appellant has in good faith made an effort to engage with HMRC in relation to the payment of the tax.

27. Having given careful consideration to the matter, the Tribunal has ultimately  
35 concluded that where a time to pay agreement is not sought until after the relevant deadline, or where payment is ultimately not made until after the agreed deferred deadline, the mere fact that the appellant has sought to engage with HMRC at all cannot, *of itself*, be said to be a "special circumstance". The legislation expressly expects that any time to pay agreement must be requested before the deadline, and  
40 payment made within any agreed deferred deadline. Where an appellant fails to comply with either of these requirements, the Tribunal does not consider that the mere fact that the appellant has sought to engage with HMRC at all can of itself be considered a "special" circumstance.

28. That does not exclude the possibility that the fact that an appellant has sought to engage in good faith with HMRC, together with other relevant circumstances, might in combination amount to a reasonable excuse or special circumstances. The Tribunal has therefore considered the circumstances of this case as a whole. The legislation expressly provides that inability to pay cannot be a reasonable excuse or a special circumstance. We have found above that lack of awareness of the penalty regime is not capable of constituting a special circumstance. The Tribunal concludes that all of the circumstances of this case, considered as a whole, fail to establish either a reasonable excuse or special circumstances.

29. Where the Tribunal finds that there are special circumstances for purposes of paragraph 9, the Tribunal has a discretion to reduce the penalty. However, unless the Tribunal first finds that there are special circumstances for purposes of paragraph 9, the Tribunal has no general discretion to reduce the penalties (see paragraph 10(2) above).

**Conclusion**

30. For the reasons above, the Tribunal dismisses the appeal.

31. 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.

**Christopher Staker**

**TRIBUNAL JUDGE**

**RELEASE DATE: 5 January 2012**