



TC01797

Appeal number TC/2011/06317

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

METEOR CAPITAL GROUP LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: DR CHRISTOPHER STAKER (Tribunal Judge)
MR ANTHONY HUGHES (Tribunal Member)**

Sitting in public in London on 17 November 2011

Mr Simon Bottomley and Mr Barry Edwards of the Appellant

Ms Gloria Orimoloye for the Respondents

DECISION

Introduction

1. This is an appeal against a penalty assessment of £14,852.76 imposed under
5 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 10 months of the year ending 5 April 2011.

2. This appeal was heard in London on 2 November 2011. The Tribunal gave its
10 decision orally at the end of the hearing. The parties agreed pursuant to Rule 35(3) of
the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 that is it
unnecessary for this decision to include full or summary findings of fact and reasons
for the decision. The Appellant subsequently requested full reasons for the decision,
which are now provided.

3. At the hearing, and in the oral determination given by the Tribunal on the day of
15 the hearing, reference was not made to the decision in *Dina Foods Ltd v Revenue &
Customs* [2011] UKFTT 709 (TC) (“*Dina Foods*”). References to this case are now
made in the present written determination. The Tribunal does not refer to it as an
authority to be given any precedential weight, given that the parties did not refer to it.
20 The Tribunal considers however that the reasoning in that case reflects the reasons
given by this Tribunal in its oral decision. To the extent indicated below, it is now
referred to as a useful expression of this Tribunal’s own reasons.

The relevant legislation

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

- 25 (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.
- 30 (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
35 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

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

5. 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.

6. 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.

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

(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 (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—

(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);

...

- (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.
- 5 (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) 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.
- 10 (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.
- (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.
- 15 (8) For the purposes of this paragraph—
 - (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.
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...

8. 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.
- 25 (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—
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 - (a) staying a penalty, and
 - (b) agreeing a compromise in relation to proceedings for a penalty.

9. Paragraph 10 of Schedule 56 states as follows:

- 35 (1) This paragraph applies if—

- 5
- (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”).
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- (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),
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- P becomes liable, at the date of the notice, to that penalty.
- (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.
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- (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.

25 10. Paragraph 16 of Schedule 56 states as follows:

- (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)—
 - (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
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- 35

- (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.

5 11. 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 12. The operation of Schedule 56 was recently considered in *Dina Foods*. It was said by the Tribunal in that case amongst other matters that:

15 (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]);

(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]);

20 (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]);

25 (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]);

30 (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]);

35 (6) the penalty imposed in that case was not disproportionate (at [40]-[42]).

The hearing, evidence and arguments

13. At the hearing, the Appellant was represented by Mr Simon Bottomley and Mr Barry Edwards, officials of the Appellant company. HMRC was represented by Ms Gloria Orimoloye.

14. 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 19th day of each month.

5 15. The HMRC bundle produced for the hearing included at page E1 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. The payments are between 1 and 3 days late each, other than the last payment which was 12 days late. These details were not in dispute. According to this table, the payments were made after the 19th of the month
10 in 10 of the relevant months. It has not been suggested that the amount of the penalty assessment has not been correctly calculated in accordance with paragraph 6 of Schedule 56.

15 16. The Appellant's case is as follows. The Appellant is a small company that does not have a dedicated HR or payroll department. Mr Bottomley has many responsibilities, including payroll. The Appellant's payday is the 24th of each month, or, if that is not a working day, the previous working day. Mr Bottomley runs the payroll every month on the last day that he can to get payments into everyone's accounts on payday, and at the same time he pays the previous month's PAYE and NIC. BACS payments of PAYE and NIC were therefore always made on or before
20 the 22nd of each month. Mr Bottomley does not recall seeing a warning letter from HMRC in May 2010, but would not have paid too much attention to it if he had, as he would have received it a day or two after making payment, and would have assumed that it had been sent out in error because payment had not been allocated quickly enough. It would not have occurred to him that anything was wrong, since he had
25 made payment that month in exactly the same way that he did every other month. The Appellant was completely unaware that the system was not compliant until Mr Bottomley spoke to someone at HMRC on 4 July 2011. The marginal lateness of payments was not an attempt to gain a cash flow advantage, but was simply a function of the system previously in use that was thought to be compliant, and lack of
30 knowledge of the new penalty regime. The penalty is out of all proportion. No warning was given as to the magnitude of the penalties. The penalty equates to interest of over 300 per cent per annum on the late payments, and is a very significant burden on a small company such as the Appellant. The Appellant will in future make all payments by CHAPS to ensure that they are received by HMRC by the 22nd of the
35 month.

17. The Appellant also argues that the penalty would be lower if a different allocation method for payments was used. If the first payment made for the year was allocated to the second month instead of the first, and the second payment for the year allocated to the third month, and so forth, and if the last payment for the year is allocated to the
40 first month, then the resultant penalty would be £3,332.07 rather than £14,852.76.

18. The HMRC case is as follows. Payment dates have been clearly advertised in HMRC publications and on its website, including in Employers Bulletins, which amongst other matters highlight the need to check with the bank how long payments take to reach HMRC on time. HMRC publicised the new late payment penalties for

PAYE extensively before and after they came into effect. An employer pack featuring a CD-ROM was mailed to employers in February 2010, flyers mailed to contractors, and factsheets distributed at face to face events, and published on the HMRC website. Late payment penalties featured in several issues of the Employers Bulletin, on PAYE pages of the HMRC website, and in published guidance and HMRC Employer Help Books. There is a requirement for employers to keep up to date with changes. If the Appellant had read the publications, it would have been aware of the magnitude of the penalties. If a payment received by HMRC does not specify how the payment is to be allocated, HMRC decides the allocation itself, and does so to the best advantage of the taxpayer to the best of HMRC's knowledge at the time. Allocation cannot be changed afterwards unless there has been a clear misallocation. The allocations suggested by the Appellant would be to manipulate the system to reduce the penalty, rather than allocating to the correct months. Payments have been allocated based on the time they were received, and have not been allocated to achieve the highest possible penalty. Notices requiring payment (P101(D)) were sent to the Appellant for months 2, 3, 5, 7, 9, 10 and 11, and the Appellant did not approach HMRC to discuss payment difficulties. Ignorance of the law is no excuse. There is no evidence that of circumstances amounting to a reasonable excuse of justifying a special reduction. HMRC has correctly applied the legislation.

20 **The Tribunal's findings**

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

- (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;
- 25 (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;
- 30 (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;
- 35 (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.

20. The Tribunal notes that in any event, the evidence is that HMRC did in fact send the Appellant a letter in May 2010, after the first default. The first default would have attracted no penalty, if there had been no further defaults for the remainder of the tax year. Mr Bottomley is said to have "assumed" that this letter was sent in error, on the basis that the payment had been made on time but not allocated on time. The

Tribunal considers that a reasonable employer, aware generally of its responsibilities to make timely payments of PAYE and NICs amounts due, would not have made assumptions about a letter such as this, but would have enquired of HMRC the cause of the problem in order to determine whether any action was required for the future.

5 21. The Tribunal has considered whether the penalty is disproportionate. In *Dina Foods*, at [40]-[42], the Tribunal said as follows:

10 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 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.

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

30 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 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.

45 22. The Tribunal agrees, for the reasons given in *Dina Foods*, that the penalty regime itself cannot be considered to be is “devoid of reasonable foundation” or “not merely

harsh but plainly unfair”. As to the penalty imposed in the present case, we find as in given in *Dina Foods* that it is in accordance with the legislative scheme, which is within the margin of appreciation afforded to States. We therefore find that the penalty was not disproportionate.

5 23. For the reasons above, Tribunal is not satisfied on the evidence that there is a reasonable excuse for the late payment, or that there are special circumstances justifying a mitigation of the penalty, or that the penalty was disproportionate.

24. As to the Appellant’s arguments based on allocation of payments, the Tribunal rejects the argument for the reasons given by HMRC. There is no suggestion that the Appellant instructed HMRC at the time of payment as to how payment was to be allocated. In the absence of any such instruction, it was entirely logical for HMRC to allocate payments in the way that it did.

25. It follows that the appeal must be dismissed.

Conclusion

15 26. For the reasons above, the Tribunal dismisses the appeal.

27. 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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Christopher Staker

TRIBUNAL JUDGE

RELEASE DATE: 1 February 2012

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