



TC02251

Appeal number: TC/12/06367

Penalty – late payment of PAYE and NICs (FA 2009 Sch 56) – reasonable excuse for late payment – no – Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

GEORGE STUBBS INSURANCE SERVICES LTD Appellant

- and -

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

**TRIBUNAL: JUDGE ANNE SCOTT, LLB, NP
 CHARLOTTE BARBOUR, CA, ATII**

**Sitting in public at George House, 126 George Street, Edinburgh on Thursday
6 September 2012.**

No appearance by or on behalf of the Appellant

Mrs Elizabeth McIntyre, HM Revenue and Customs for the Respondents

© CROWN COPYRIGHT 2012

DECISION

1. The Tribunal granted HMRC's application to proceed in the Appellant's absence pursuant to Rule 33 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The Appellant had been notified and was aware of the hearing. The Tribunal decided that it was in the interests of justice to hear the Appeal in the Appellant's absence because:

(a) The Appellant was aware of the Hearing and had asked for matters to be dealt with in his absence.

(b) The Appellant had submitted an additional letter dated 31 August 2012 amplifying the grounds of appeal previously submitted by him in the Notice of Appeal dated 11 June 2012 with supporting Note and the letter from him dated 16 December 2012. That letter dated 31 August 2012 focused on cash flow problems, the fact that the payments were only a matter of days late and the inequity of the penalty regime. He asked that the Tribunal take this into account in its deliberations, in his absence.

(c) In addition, the Appellant has been professionally advised in this matter and the Tribunal had the letter of appeal dated 1 December 2011 from the Appellant's professional advisors, Morris and Young outlining the basis of the Appeal, and in all these circumstances there was a sufficiency of evidence to enable the Tribunal to properly consider the matter.

2. This decision concerns penalties imposed by HMRC for late payment of PAYE (and associated National Insurance Contributions) by the Appellant for the year 2010-11. The relevant legislation is contained in Schedule 56 Finance Act 2009, as amended by Schedule 11 Finance (No 3) Act 2010. That amended legislation applies to penalty assessments raised after 25 January 2011, which is the situation in this case. This was the first year of operation of the new penalties.

3. It was not in dispute that all of the PAYE payments in the year were late. The amount of the actual payments was not in dispute. The first failure for the tax year does not count as a default for that year and following the case of *Agar Ltd v HMRC*[2011] UKFTT 773 (TC) the 12th penalty should not have been included in the penalty notice. Accordingly, the Decision, on review, dated 17 May 2012 with the amended quantification of the penalty at £8,208.76 is the subject matter of this Appeal.

4. The Appellant's arguments were that:

(a) he had major cash flow problems,

(b) he thought the size of the penalties was excessive,

- (c) he had not been warned within the year about the penalties and therefore believed them to be “backdated” which, in his opinion, was unfair,
- 5 (d) he tried to make the payments within a week or two of the due date, albeit he had been “harassed for payments sometimes only 4/5 days after the due dates”,
- (e) he had been distracted from “the minutiae of administering his business” because he had concentrated on expanding the business and he had been engaged in litigation with a competitor which settled in late 2011, 10
- (f) the penalty should be waived because it arose from new legislation and “Mr Stubbs has very much been a victim of the timing of that legislation.”, and 15
- (g) he believes that he has been harassed and treated unfairly compared with other taxpayers.

5. A clear summary of Schedule 56 and the implications thereof is set out by Judge Berner in *Dina Foods v HMRC* [2011] UKFTT 709 and we do not propose to repeat that here other than to adopt the reasoning in that case, where relevant to this case. 20

6. Given the agreement by the parties that the payments had been late and, in the absence of special circumstances or reasonable excuse, HMRC was obliged to impose a penalty in terms of paragraph 11 of Schedule 56. 25

7. Under paragraph 16 of Schedule 56 the Appellant may escape liability for a penalty if the Tribunal is satisfied that there was a reasonable excuse and that, therefore, is the issue for the Tribunal in this case as there is no dispute about the size and number of the defaults. In considering a reasonable excuse the Tribunal examines the actions of the Appellant from the perspective of a prudent tax payer exercising reasonable foresight and due diligence and having proper regard for its responsibilities under the Taxes Acts. 30

8. In general an insufficiency of funds does not qualify as a reasonable excuse. In any event, as Mr Stubbs himself says in his letter of 16 December 2011 he arrived at arrangements to pay other creditors who were content to receive payments days or weeks late. In the Notes for reference attached to the Notice of Appeal Mr Stubbs pointed out that the Appellant had come to an arrangement with the Bank and that was used to pay wages and Mr Stubbs’s income. Clearly, there was constant contact with HMRC throughout the year about the late payment of PAYE but there is no dispute that it was always after the payment was late and not before, and that it was at the instigation of HMRC, and Mr Stubbs took exception to that as he believed it to be harassment. It is evident from HMRC’s records, which were produced, that HMRC had attempted contact on numerous occasions and that on a number of occasions such 35 40 45

as on 5 September 2012, 12 October 2010, 3 November 2010 and 11 January 2011 there had been recorded refusals to make payment.

5 9. His agents correctly point out “if he had applied for time to pay no penalties
would have been levied”. What he did not do in this case was to apply to HMRC for
time to pay at least before February 2011 when, having been informed of the process
by HMRC he indicated that he would be making contact. The Appellant received an
initial Penalty Default Warning letter in May 2010 (and that explains about time to
10 pay) and no less than seven enforcement warning letters were sent. No mail has been
returned to HMRC and all correspondence relating to the imposition of the penalties
has been safely received. On the balance of probabilities the earlier mail will also
have been received. Looking to the totality of the evidence it seems clear that it may
very well have been the case, as both Mr Stubbs and his agent state, that he was too
15 busy expanding his business and dealing with his competitor to attend to
administrative detail but how that, and the cash flow, were managed was a matter for
the Appellant. The fact is that the PAYE payments were all late and that no contact
was made with HMRC requesting time to pay before the payments became due.

20 10. Time to pay carries a specific meaning in the context of the penalty regime. As
indicated in the previous paragraph, the Penalty Default Warning letter issued in May
2010 explains time to pay and makes it clear that if a taxpayer is unable to pay on
time then they must contact HMRC before the due date and in particular that contact
should be with the Business Payment Support Service who “may agree to extra time
25 to pay”. The publicity referred to in paragraph 12 below specifically explains what
time to pay means. For example, the section in the Employer Bulletin Issue 35 dated
April 2010 states under the heading “Can’t pay” that “If you are worried that you
won’t be able to pay please ring HMRC’s Business Payment Support Service on...as
soon as possible. If you contact us before the payment is due and we agree time to
30 pay, we won’t charge penalties on payments covered by the agreement - providing
you stick to the agreed terms.” That is a time to pay agreement and that did not
happen in this case. In not one instance was there contact with HMRC, let alone the
Business Payment Support Service, before the due date for payment.

35 11. An exceptional or unforeseen factor might have been sufficient to amount to a
reasonable excuse. The Tribunal, and HMRC did consider that. The expansion of the
business cannot fall into that category since that was planned and would have been
expected to produce extra pressures or stresses. Was the litigation such a factor? It is
noted that the litigation was expensive (Mr Stubbs the cost of the litigation was
£200,000 over 18 months and his agents said £170,000). The Tribunal considered one
40 factor particularly relevant, which was that Mr Stubbs stated clearly and repeatedly in
his correspondence that it was in the context of those difficulties that he had had to
make payment arrangements with others and arrange bank finance so it is evident that
Mr Stubbs was managing the issue but not with HMRC in a manner that could avoid
penalties. As his agents properly stated, he could have sought, but did not seek, a time
45 to pay agreement with HMRC, at least before February 2011 when he was advised by
telephone of the detail of the penalty regime. It seems clear that there was a belief that
if the payments were made not long after the due date then there would be no real

problem. Unfortunately that belief did not reflect the reality of the new penalty regime.

12. 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 weremailed 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 inlocal and national media. The Appellant was professionally advised.

13. Mr Stubbs was very well aware that his PAYE payments were consistently in arrears and he complained about frequent contact from HMRC about the arrears. We cannot know whether or not the question of penalties arose in those telephone conversations, when it was possible for HMRC to actually make contact with the Appellant. However, the legislation does not require HMRC to issue warnings to individual employers: they did issue general material about the new system as indicated in the previous paragraph.

14. We find that the Appellant’s lack of awareness of the rigour of the penalty regime is not capable of constituting a special circumstance or reasonable excuse: 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. Similarly, we find that any perceived failure on the part of HMRC to issue specific 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.

15. 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. We do not.

16. The Appellant’s agents requested that the penalty be waived because it arose from new legislation and “Mr Stubbs has very much been a victim of the timing of that legislation.” That does not amount to a reasonable excuse.

17. The Appellant’s primary reason, as stated in the original notice of Appeal, was that HMRC had not been sufficiently sympathetic or flexible and that the system was generally unfair. On the question of unfairness the Tribunal adopts the reasoning in *Dina* at paragraph 42. The Tribunal finds that, looking to the totality of the evidence,

the Appellant did not exercise reasonable foresight or diligence and nor was there a proper regard for the responsibilities imposed by the legislation.

18. For all these reasons the Appeal is dismissed.

5

19. 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.

15

**ANNE SCOTT, LLB, NP
TRIBUNAL JUDGE**

RELEASE DATE: 7 September 2012

20

Amended pursuant to Rule 41 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on 10 December 2012.