



TC02272

Appeal number: TC/2012/05761

*Penalty – late payment of PAYE and NICs payments – FA 2009, Sch 56 -
Whether a reasonable excuse – no - whether any special circumstances existed to
justify a reduction in the penalty amount – no - proportionality - appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

THANE DISPERSIONS LIMITED

Appellant

- and -

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

**TRIBUNAL: JUDGE JENNIFER BLEWITT
MRS B. TANNER**

Sitting in public at Stoke on 9 August 2012

Mr Kimber, Managing Director, for the Appellant

**Mr Jones, instructed by the General Counsel and Solicitor to HM Revenue and
Customs, for the Respondents**

DECISION

1. This is an appeal by Thane Dispersions Limited (“the Appellant”) against the penalty imposed by HMRC under Schedule 56 Finance Act 2009 for the late payment of PAYE and National Insurance Contributions during the tax year 2010/2011. The penalty, in the sum of £1739.79, was issued to the Appellant on 30 September 2011 and revised on 17 April 2012 in accordance with the case of *Agar Limited* (TC/2011/04910).

Issues

2. The Appellant accepted that the payments were made late and there was no issue as to whether the penalty was correctly charged and calculated. The sole issue for the Tribunal to determine was whether the Appellant had a reasonable excuse for failing to pay its monthly PAYE payments by the due dates.

Legislation

3. The legislation was not in dispute but it may be helpful at this point to set out the relevant provisions.

4. Regulation 69 Income Tax (PAYE) Regulations 2003 (SI 2003 No 2682) determines when an employer must pay amounts of tax required to be deducted under Regulation 68 (2).

5. Schedule 56 Finance Act 2009 provides:

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...

| <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 |

6(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))...*

... (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.*

(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.*

Special reduction

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.*

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—*

- (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)—*

- (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*
- (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.*

Facts

6. The Appellant made 10 late payments under the relevant PAYE and NIC regulations in the year ended 5 April 2011. The penalty was set at a rate of 4% in accordance with the legislation applicable.

The Appellant's case

7. The Appellant appealed the penalty to HMRC by letter dated 11 October 2011 in which it was stated that the Company has severe cash flow difficulties and continuing restrictions on its overdraft. The Appellant noted that there was no point in making a payment that would not be honoured by the bank.

8. In a further letter to HMRC dated 14 November 2011, the Appellant added that its cash flow problems were unprecedented, the bank reduced its overdraft facility and customers paid late all of which affected its ability to make PAYE and NIC payments on time.

9. By Notice of Appeal dated 15 May 2012 the Appellant's grounds of appeal are stated as:

- HMRC accept that the late payment was due to reasons beyond the Appellant's control and therefore there is a reasonable excuse;
- It is neither fair nor legitimate to add penalties to an already difficult position;
- The penalty is disproportionate to the alleged offence as all taxes were paid within a relatively short period of time of the due date.

10. Mr Kimber also gave oral evidence to the Tribunal. He accepted that HMRC had given warnings about potential penalties in telephone calls but stated that he had informed HMRC that the Appellant's financial difficulties would improve – which they have.

11. Mr Kimber explained that the bank had reduced the Appellant's overdraft facility at a time when the Company was not making money which had led to the Director's putting personal funds into the Company.

12. Mr Kimber clarified that in 2008 the Company lost 3 customers, one of which was the Appellant's second biggest customer. The Company survived into 2009, however at that point the Company had to make redundancies. He explained that the Company's diversification into export markets has now come to fruition.

13. We were provided with letters from the Appellant to HMRC dated 11 October 2011 and 14 November 2011 in which the Appellant requested a Time To Pay arrangement with HMRC due to cash flow difficulties and restricted borrowing facilities. The letter sets out that the Appellant's situation appears to be improving due to an upturn in its export business and the fact that the Company has stopped paying for equipment purchased 18 months earlier.

HMRC's Case

14. Mr Jones, on behalf of HMRC responded to the Appellant's arguments in helpful written submissions. We will not set out the contents in detail, however the principle points can be summarised as follows:

- The penalty levels and rates are set by statute and cannot be varied;
- The Appellant had been late in making its PAYE payments every year since 2003/2004, with only the odd payment being made prior to the due date;
- The Appellant was warned by letter, employer bulletins and telephone about the consequences of late payments;
- The legislation specifically excludes insufficiency of funds as a reasonable excuse unless attributable to events outside the Appellant's control. The Appellant has a long history of late payment and the cash flow difficulties were an ongoing problem about which the Company was aware, yet it failed to take any steps to manage the problem or reach an agreement with HMRC for time to pay;
- The late payments are constant at between 13 to 19 days late each month, suggesting that no unusual event or occurrence was the cause;
- There are no special circumstances nor does the Appellant have a reasonable excuse.

15. We were referred to the following cases by HMRC:

- *Dina Foods Limited* [2011] UKFTT 709 TC
- *International Transport Roth GmbH v Home Secretary* [2003] QB 728
- *National and Provincial Society v United Kingdom* 1997 (25) EHRR 127

Discussion and Decision

16. We considered the oral and documentary evidence on behalf of the Appellant carefully. Whilst we were sympathetic to the cash flow difficulties suffered by the Appellant, we noted that they had been ongoing for a substantial amount of time prior to the year which is subject of this appeal. We noted that HMRC had accepted that the Appellant's cash flow difficulties were due to events beyond its control, but we accepted the submission by Mr Jones that once such difficulties occurred the onus was on the Appellant to manage its affairs, for example by reaching a time to pay agreement with HMRC, in order to make the payments. At no time did the Appellant make use of the facilities offered by HMRC to those experiencing such difficulties nor did the Appellant contact HMRC prior to the due dates in order to explain the difficulties. Instead the Appellant chose to make its payments late which, in our view, was not the way in which a reasonable person, seeking to adhere to his legal obligations, would act. In those circumstances, we found that any reasonable excuse

which may have existed in respect of years prior to 2010/11 when the difficulties began was not remedied without unreasonable delay and therefore there was no reasonable excuse in respect of 2010/11. We also noted that the letter dated 11 October 2011 makes reference to the fact that the Company had ceased paying for equipment purchased 18 months earlier. We inferred from this that the Appellant had made payments for this equipment throughout 2010/11, prioritising these payments over PAYE and NIC. The obligation to make PAYE and NIC payments is set by law, and we found as a fact that the Appellant's inability to pay, where other debts had been met, did not provide the Appellant with a reasonable excuse.

17. As regards the Appellant's submission that it is unfair to add penalties to an already difficult position, the penalties and rates are set by statute and reflect the consistently late payments made by the Appellant in each month of 2010/11. In our view, the penalties cannot be described as unfair.

18. As to the issue of proportionality, we respectfully agreed with the comments of Judge Berner in *Dina Foods Limited*:

"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.

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."

19. In following the guidance given by Judge Berner, we did not find that the penalty imposed on the Appellant was disproportionate.

20. No special circumstances were raised by the Appellant and we accepted HMRC's submission that none existed in this case.

21. In summary, we find that:

- (1) The penalty was properly levied in relation to the late payment defaults in the tax year 2010/11;
- (2) The Appellant does not have a reasonable excuse for any of the failures to pay PAYE and NICs amounts on time;
- (3) HMRC's decision that there are no special circumstances was not flawed;
- (4) The penalty was not excessive or disproportionate.

22. The appeal is dismissed

23. 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.

**JENNIFER BLEWITT
TRIBUNAL JUDGE**

RELEASE DATE: 17 September 2012