



TC02394

Appeal number: TC/2012/05239

*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 - appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

GHA COACHES LTD

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE J. BLEWITT
MR. M. BLAIN**

Sitting in public at Prestatyn on 20 August 2012

Mrs Coormiah, Financial Controller of Appellant Company, for the Appellant

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

DECISION

1. This is an appeal by the Appellant against the penalty imposed by HMRC under Schedule 56 Finance Act 2009 for the late payments of PAYE during the tax year 2010/2011.

Legislation

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

3. 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).

4. 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...

| 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 |

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 (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.

Special reduction

15 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

20 (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—

25 (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)—

30 (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

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.

Facts

40 5. The Appellant made 6 late payments under the relevant PAYE regulations in the year ended 5 April 2011. The penalty was set at a rate of 2% in accordance with the legislation applicable.

The Appellant's case

6. By Notice of Appeal dated 25 April 2012 the Appellant appealed to the Tribunal. The grounds of appeal relied upon were that notification of the penalty was

not received until 2012, some 12 months after the first period of default. Had HMRC sent a penalty for the period ending 5 September 2012 as soon as payment was late, the Appellant would have ensured that all payments thereafter were made on time.

5 7. At the hearing, Mrs Coormiah expanded on the grounds of appeal. She stated that she had worked for the Appellant for approximately 4 years as its financial controller. Payments were usually made on 17th of each month, with the cheque dated for 19th.

8. Mrs Coormiah explained that she was aware that the system had changed but was never informed that payments were received late.

10 9. It was disputed that month 8 (the deadline for which was 19 December 2010) was 11 days late as it had been posted on 16th December.

15 10. The Appellant did not receive the warning notice issued by HMRC on 28 May 2010 nor could Mrs Coormiah recall the telephone conversations, logs of which were exhibited by HMRC. Mrs Coormiah noted that one log recorded her name incorrectly as "Sarah".

11. It was submitted on behalf of the Appellant that the penalties were unfair, given that payments were only a matter of days late.

HMRC's Case

12. Mr O'Grady's response on behalf of HMRC can be summarised as follows:

- 20
- The penalty levels and rates are set by statute and cannot be varied;
 - The Appellant was warned by letter, employer bulletins and telephone about the consequences of late payments;
 - There are no special circumstances nor does the Appellant have a reasonable excuse.

25 13. HMRC relied on the case of *Dina Foods Limited* [2011] UKFTT 709 (TC) in which Judge Berner stated:

30 *"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...*

35 *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*

5 *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.*

10 *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....*

15 *We do not consider that the lack of awareness... 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*
20 *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....”*

Discussion and Decision

25 14. We considered the submissions made by Mrs Coormiah carefully. In respect of month 8 (December 2010) we noted Mrs Coormiah's evidence that the payment was posted to HMRC on 16th December 2010. Mrs Coormiah accepted in answer to a question from the Tribunal that no account had been taken of the Christmas period. In our view, HMRC's guidance of 3 days to allow for payment by post to be received by
30 the due date is reasonable in normal circumstances; however regard must be had to the Christmas period over which postal delays are to be expected. We were satisfied in those circumstances that HMRC's record of receipt of payment on 30th December 2010 was accurate.

35 15. There was no dispute that other payments, usually made on 17th of each month, arrived late. We noted that Mrs Coormiah was unaware that payments were received late by HMRC. In our view, the onus rests with the taxpayer to ensure that payment is made by the due date.

40 16. There is no legal obligation on HMRC to issue a warning notice, yet they did so. Mrs Coormiah was adamant that she had not received this notice from the directors, who open the post and pass it to Mrs Coormiah for distribution. Even accepting that this was the case, we do not find the lack of receipt of such a letter could provide the Appellant with a reasonable excuse nor would it constitute special circumstances.

17. We considered the log of telephone calls exhibited by HMRC. The telephone call dated 28 May 2010 records Mrs Coormiah's name incorrectly as "Sarah", as

noted by Mrs Coormiah, who disputed that this telephone call had taken place. The log records a warning about penalties given by HMRC. Mrs Coormiah accepted that a further telephone call on 25 November 2010 as recorded in HMRC's log may have occurred but she disputed that a warning as to penalties had been given as noted in the log. We could not accept that HMRC had dishonestly falsified a log of a telephone call on 28 May 2010. We noted that although the name "Sarah" was inaccurately recorded, the log contained the correct surname and we were satisfied that this reinforced our view that the telephone call had taken place and a warning of penalties had been given. As to the telephone call on 25 November 2010, we found as a fact that Mrs Coormiah's recollection of the call was vague and we were satisfied that the log exhibited by HMRC provided a reliable account of the warning given about penalties. In those circumstances we did not accept the Appellant's submission that there had been a failure by HMRC to provide notification about the penalties.

18. On the issue of fairness, we respectfully agree with the comments of Judge Berner in *Dina Foods Limited* that:

"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 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 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.

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."

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

20. 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 amounts on time nor are there any special circumstances;

(3) The penalty was not excessive, unfair or disproportionate.

21. The appeal is dismissed

5 22. 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
10 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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**J. BLEWITT
TRIBUNAL JUDGE**

RELEASE DATE: 30 October 2012

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