



TC02494

Appeal number: TC/2012/05044

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 CHAMBER**

BLOCKFOIL LTD

Appellant

- and -

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

**TRIBUNAL: JUDGE CHRISTOPHER STAKER
MS SONIA GABLE**

Sitting in public in Colchester on 10 September 2012

Mr P Starling and Mr Corbett of the Appellant

Ms E Gardiner for the Respondents

DECISION

Introduction

1. This is an appeal against a penalty assessment (as amended) of £5,150.82 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 9 months of the year ending 5 April 2011.

2. This appeal was heard in Colchester on 10 September 2012, and the parties agreed pursuant to Rule 35(3) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 that it was unnecessary for the decision to include full or summary findings of facts and reasons for the decision. Subsequently, the Appellant requested full written findings and reasons, which are now provided.

The relevant legislation

3. 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
--	--	--	--------------

4. 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.
 - (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.

- 5
- (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.

...

8. Paragraph 9 of Schedule 56 states as follows:

- 10
- (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.
 - (3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—
 - (a) staying a penalty, and
 - (b) agreeing a compromise in relation to proceedings for a penalty.
- 15

9. Paragraph 10 of Schedule 56 states as follows:

- 20
- (1) This paragraph applies if—
 - (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”).
 - (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),
- 25
- 30
- 35
- 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.
- (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.

10. Paragraph 16 of Schedule 56 (as amended by the Finance (No 3) Act 2010) states as follows:

- (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 paragraphs 6, 8B, 8C, 8G and 8H.
- (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.

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.

The hearing, evidence and arguments

12. At the hearing, Mr P Starling and Mr Corbett of the Appellant company presented the Appellant's case. HMRC was represented by Ms Gardiner.

13. 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.

14. The HMRC internal review decision dated 23 March 2012 revised the amount of the penalty to take account of the decision in *Agar Ltd v Revenue & Customs* [2011] UKFTT 773 (TC). The revised penalty is accordingly calculated on the basis that the 12th penalty should not have been included in the penalty notice, as the Appellant became liable to it after the end of the tax year in question.

15. HMRC produced for the hearing a table showing the amounts of PAYE and NIC due for each of the relevant months, the penalty trigger date for each month, the date that payment was made for each of the months, and number of days that the payment was late in each of the 9 months in which payment is said by HMRC to have been late.

16. The arguments advanced by the Appellant are as follows.

17. Since 1998, the Appellant company has almost every month made PAYE payments at the same time, almost exclusively without complaint from HMRC. While the Appellant is unable to say the exact date of posting of its cheques to HMRC, which may have been several days late, the payments could not be described as seriously overdue. If payments were late, this was a repetitive error over a very long period of time and if HMRC was particularly concerned about the late payment profile, HMRC should have raised this with the Appellant well in advance of the penalty notice being issued.

18. The Appellant has no record of receiving a letter from HMRC, and HMRC has been unable to provide a copy. Had the Appellant been warned that its payment profile was no longer acceptable to HMRC, the Appellant would immediately have modified the date that the monthly payment was sent. HMRC should have given a timely warning to the Appellant if it was in a penalty position. The penalty does not pass a reasonableness test.

19. The company has tried to do the right thing, and the penalty is harsh. The Appellant has now rectified matters.

20. The Appellant has been advised by an HMRC official that Schedule 56 was not designed to be used in this manner.

21. HMRC recently agreed a creditors voluntary arrangement for a close competitor of the Appellant, which is not fair as this provides a subsidy to a competitor.

22. The Appellant does not dispute that payments have not reached HMRC by the due date, but the appeal centres on the fact that in the year in question the Appellant paid its PAYE at the same time of the month as in the previous 12 years, that the Appellant is a small company that has sought to do the right thing, that the HMRC warning letter makes no reference to the new legislation, and the Appellant has no record of receiving the warning letter. There has been no intent on the part of the Appellant to avoid paying PAYE. The reason for late payment has been administrative, and HMRC has failed to communicate changes in the collection regime, of which the Appellant was unaware. The Appellant does not recall receiving the employer pack or CD-ROM giving publicity to the new regime, does not recall seeing anything in the media about it, and the Appellant does not have the time to monitor the HMRC website and can only digest a fraction of the deluge of information coming into the e-mail and postage tray. Even the Appellant's accountants were unaware that penalties were to be levied in this way. The Appellant does not recall receiving the HMRC letter of 29 June 2010. There is no mention in the template of the letter said to have

5 been sent on 29 June 2010 of a change in the penalty regime. The Appellant has been as helpful to HMRC as it can, and HMRC has not reciprocated. There was an unreasonable delay in levying the penalty, and had the penalty notice been issued promptly, the Appellant would have changed its system immediately, which it did immediately upon receiving the penalty notice.

10 23. The HMRC position is as follows. HMRC wrote to the Appellant about late payment on six occasions in 2006-07, and on 8 occasions in 2007-08. In 2008-09, HMRC sent letters to the Appellant warning of legal action in respect of late payment for months 1 and 2. HMRC spoke to the Appellant on 2 June 2009 warning of legal action in respect of late payment for month 1 of 2009-10. On that occasion, the Appellant said that the late payment was due to cash flow problems and that future payments would be made by the 19th of the month. On 6 January 2010 HMRC spoke to the Appellant about late payment for month 8 and the Appellant said that this was because it had been overlooked. On 25 June 2010 HMRC spoke to the Appellant in respect of late payment for month 2, and reminded the Appellant of PAYE payment dates and warned of legal action and penalties. A late payment warning letter was sent to the Appellant on 29 June 2010. On 25 January 2011 HMRC spoke to the Appellant regarding late payment for month 9 and warned of penalties. On 24 March 2011 HMRC spoke to the Appellant regarding late payment for month 11. On 23 May 2011 HMRC spoke to the Appellant about late payment of month 1 for 2011-12 and advised the Appellant of penalties and legal action. A warning letter was issued by HMRC to the Appellant on 27 May 2011 for the 2011-12 tax year. It is the Appellant's responsibility to ensure that it complies with the legislation and makes payments on time without warnings. HMRC publishes information on PAYE due dates, methods of payment and penalties. HMRC records show that a warning letter was sent on 29 June 2010. That letter contained clear information regarding penalties and provided a link to the HMRC website where further information was available.

The Tribunal's findings

24. The Tribunal finds that:
- 30 (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;
 - 35 (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;
 - 40 (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;
 - (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.

25. Neither of the parties referred the Tribunal to case law on the above matters, but the Tribunal notes in passing that the conclusions above are consistent with those reached by the Tribunal in other cases: *Dina Foods Ltd v Revenue & Customs* [2011] UKFTT 709 (TC); *Meteor Capital Group Ltd v Revenue & Customs* [2012] UKFTT 101 (TC); *St John Patrick Publishers Ltd v Revenue & Customs* [2012] UKFTT 20 (TC); *Bright Matter Ltd v Revenue & Customs* [2012] UKFTT 572 (TC).

26. The Tribunal notes that the evidence is that HMRC records indicate that HMRC did send the Appellant a letter 29 June 2010, after the first default in 2010-11. The Tribunal finds on a balance of probabilities that this letter was sent. The first default would have attracted no penalty, if there had been no further defaults for the remainder of the tax year. Even if the letter said that penalties “may” be imposed for further defaults rather than that penalties “would” be imposed, it certainly gave the Appellant no reason to think that penalties would *not* be imposed. The Appellant was expressly warned that penalties “may” be imposed, and cannot therefore have been surprised when they were. The Tribunal considers that a reasonable employer, aware generally of its responsibilities to make timely payments of PAYE and NICs amounts due, would have been prompted by this letter to enquire of HMRC the cause of the problem and to obtain information about the penalty regime.

27. The Tribunal notes that in *Dina Foods*, at [40]-[42], the Tribunal considered whether the penalty was disproportionate, and said as follows:

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.

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.

5 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,
10 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
15 the State in this respect. Accordingly we find that no Convention right
has been infringed and the appeal cannot succeed on that basis.

28. On the evidence, the way that the penalty regime works is that HMRC sent
information to employers about the new penalty regime before it came into force.
During the first year of operation of the regime, employers were sent a letter the first
20 time that they made a late payment, informing them that they may be subject to
penalties if they are late again, and advising where information about the penalty
regime can be obtained. Ignorance of the law is not a reasonable excuse for failure to
pay tax on time. The Tribunal agrees, for the reasons given in *Dina Foods*, that the
penalty regime itself cannot be considered to be “devoid of reasonable foundation” or
25 “not merely harsh but plainly unfair”, and that the penalty regime is not
disproportionate. We find that the penalty imposed in the present case is in
accordance with the legislative scheme, which is within the margin of appreciation
afforded to States.

29. The Tribunal does not consider that the failure of HMRC to advise the Appellant
30 during the tax year that it *was* incurring penalties gave rise to any legitimate
expectation on the part of the Appellant that he would not be charged a penalty. The
Tribunal is not persuaded on the evidence that HMRC showed a lack of concern for
the Appellant’s “late payment profile”.

30. In any event, the Tribunal is satisfied on the evidence before it, on a balance of
35 probabilities, that HMRC did have telephone conversations with the Appellant on 25
June 2010 and 25 January 2011, in which the Appellant was warned of penalties.

31. The Appellant claims to have been advised by an HMRC official that Schedule 56
was not designed to be used in this manner. However, the Tribunal must apply the
legislation in accordance with its terms, as interpreted by the Tribunal in accordance
40 with established legal principles of statutory interpretation.

32. The appellant claims that HMRC recently agreed a creditors voluntary
arrangement for a close competitor of the Appellant, which is not fair as this provides
a subsidy to a competitor. The Tribunal finds that the Appellant has not established
by evidence the relevant circumstances relied upon, or established how these claimed
45 circumstances are relevant to the present appeal.

33. For the reasons above, the 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.

Conclusion

5 34. For the reasons above, the Tribunal decided to dismiss the Appellant’s appeal, and to confirm the penalty imposed.

35. 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.

10

15

**DR CHRISTOPHER STAKER
TRIBUNAL JUDGE**

20

RELEASE DATE: 10 January 2013