



TC02537

Appeal number: TC/2012/09923

INCOME TAX - 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**

**NO 1 TRAVELLER (LGW) LIMITED
formerly BACKGROUND AVIATION (LGW) LIMITED**

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE CHRISTOPHER STAKER
MR TOBY SIMON**

Sitting in public in London on 23 January 2013

Mr P Lawes of the Appellant

Ms K Weare, Presenting Officer for the Respondents

DECISION

Introduction

1. This is an appeal against a penalty determination 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 respect of 10 months of the year ending 5 April 2012. The penalty imposed was originally of £6,213.84, being 4% of the amount of PAYE and NIC that was paid late in 10 months of the year in question. The penalty was subsequently revised by HMRC to the amount of £3,910.45, being 3% of the amount of PAYE and NIC that was paid late in 8 months of the year in question.

2. This appeal was heard at Bedford Square on 23 January 2013, and an oral determination was given at the end of the hearing. After the determination was given, Mr Lawes on behalf of 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	The date determined by or under

		regulations . . .	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.

10 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

15 (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—

20 (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);

25 ...

(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.

30 (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.
- 5 (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.
- (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;
 - 10 (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:

- 15 (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.
- 20 (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.

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

- (1) This paragraph applies if—
 - (a) P fails to pay an amount of tax when it becomes due and payable,
 - 30 (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.
- 35 (3) But if—
 - (a) P breaks the agreement (see sub-paragraph (4)), and
 - 40 (b) HMRC serves on P a notice specifying any penalty to which P would become liable apart from sub-paragraph (2),

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 Paul Lawes, the Chief Financial Officer of the Appellant company, presented the Appellant's case. HMRC was represented by Ms Weare.

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. HMRC produced for the hearing a table (page 27 of the documents bundle) showing the amounts of PAYE and NIC due for each of the relevant months, the date that payment was received by HMRC for each of these months, and the number of days that the payment was late in each of the relevant months. The Appellant did not
5 dispute the information in the table. The table shows that payment was late every month of the year in question, by periods ranging from 1 day to 29 days. As noted in paragraph 1 above, HMRC has revised the penalty to take account of only 8 defaults rather than the original 10. HMRC determined that it would not count two months where the PAYE and NIC were received by HMRC one day late, in circumstances
10 where the Appellant had transferred the funds from its account on the final date for payment.

15. The arguments advanced by the Appellant are in summary as follows.

16. The Appellant is one of a group of companies that operates lounges and offers premium travel services at a number of airports in the United Kingdom. The
15 Appellant operates the lounge at Gatwick airport. The group operates separate payrolls for each company. The Appellant has sought to maintain good financial records and compliance with its tax obligations. It has made regular monthly payments of PAYE to HMRC. All employees are paid on the last Friday of each month, which means the date of payment will vary. The Appellant commences its
20 payroll processing in the final week of each month. The Appellant has always been aware that PAYE is due for payment on the 22nd of each month. Its practice in 2011-12 was to make the PAYE payments on or shortly after the 22nd, depending on when its month end payroll processing started. Before the new PAYE penalty regime was introduced this routine practice did not lead to any fines or penalties, but only small
25 late payment interest charges, and did not attract active correspondence from HMRC seeking full compliance. The Appellant does not contest that it made payments late in the 8 months concerned.

17. The Appellant considers that the size of the penalty is vastly disproportionate to the total payment delay. The Appellant feels aggrieved that HMRC did not directly
30 communicate with the company in writing informing it of the size of potential penalties that it could be incurring. HMRC cannot confirm if an FP12 was issued in May 2011 following the first late payment. HMRC state that an IDMS99 was issued on 24 February 2012, but by then 7 out of the late payments had already occurred. Furthermore, this was a generic letter which did not communicate the quantum of the
35 penalty. The Appellant only became aware of the size of the penalty after it was too late to remedy its inadvertent non-compliance. In 6 of the 8 months in question, the Appellant had the funds to make the necessary payments on time. Had the Appellant had been aware of the size of the potential penalties it would have paid on time in those months.

40 18. The penalty regime was not applied even-handedly, contrary to the Taxpayers' Charter. The Appellant's group of companies operated four company payrolls, and all four companies paid on the same dates during the year. However, only two of the four companies, which were those with the most employees and biggest payrolls, were singled out for late payment penalties. HMRC has singled out the larger companies

for penalties as a revenue-generating exercise, rather than applying penalties as a measure to help get things right. The Appellant cleared all of its PAYE liabilities in a matter of days after the payments were due, and the penalties are unreasonable. The tax legislation is long and difficult to know, and this was the first year of operation for
5 a new penalty regime. The penalty is very harsh if compared to a commercial interest rate for the period of the late payment.

19. At the hearing, Mr Lawes also gave evidence as follows.

20. In two of the months in the year, in respect of which payment was due on 22 August 2011 and 22 December 2011 respectively, the Appellant paid over 20 days
10 late due to a shortage of funds. At the time the Appellant's lounges were not yet a whole profitable, so that the Appellant had to draw down on loans from its investor. Typically a drawdown was paid in about 10 days of being requested if it was within the limits of the drawdown facility, but there was no hard and fast rule. If the company went over budget, it was necessary first to obtain board approval for a
15 drawdown. The Appellant's bank will not lend it money, so that it can only get funds by drawing down loans from its investor. The Appellant did not request a time to pay agreement from HMRC, because it does not like to say to HMRC that it is short of money.

21. The Appellant went over budget during the year due to reasons outside of its
20 control. The company was building a new lounge at Heathrow airport. There were unforeseeable cost overruns. One was caused by the fact that a drain at the airport had insufficient capacity, so that the company was unexpectedly required at its own expense to lay a new drain several hundred metres long. Mr Lawes could not remember if the budget had been exceeded so that board approval was required for the
25 drawdown needed to make the payment due on 22 August 2011, but he said that this was definitely the case for the payment due on 22 December 2011. The lounge at Heathrow airport was built in the period January-August 2011. The Appellant became aware that it was over budget in July 2011. However, the "full horror" was not clear until a final valuation in October 2011. It took from November 2011 to
30 January 2012 to make the required drawdown. It required meetings with the investors. The drawdown was agreed before Christmas 2011 and the actual drawdown request was made in late December 2011. The Appellant received the drawdown funds only in January 2011. As to the payment due in August 2011, to open the lounge in that month it had been necessary to make a large payment to the
35 builder in order to get the practical completion certificate.

22. In response to a question whether the Appellant would have received HMRC employer bulletins, CD-ROMs and flyers, examples of which are included in the documents bundle, Mr Lawes said that his assistant would have received these. He said that he still has employer bulletins and CD-ROMs from previous years. He said
40 that he probably received them. He said that although the HMRC bulletins said that penalties could be 3 or 4% of the amount paid late, it is not apparent from a simple reading that the penalties can mount up to thousands of pounds. The problem is more acute in the case of a group of four companies, paying on the same date, where the ultimate amount of penalty may be several times as great. He said that he did not

have time to read employer bulletins in depth and acknowledged that he should have asked his assistant to read them in depth.

23. In cross-examination, Mr Lawes described the payroll system as operated by his company in the year in question. In the first week of the month, the Appellant would bill the customers. In the second week it would finalise the previous month's accounts. In the third week it would prepare the payroll, ready for payment in the fourth week. After receiving the penalty for the year ending 2012, the company has changed its payroll system to ensure that PAYE is paid on time every month. Mr Lawes submitted that it was a reasonable excuse that the previously existing procedures of the business did not take into account the change in the penalty procedures.

24. The HMRC position is that the appeal should be dismissed, on the basis of the following submissions.

25. In relation to the Appellant's argument that the penalty is disproportionate, HMRC rely on *HMRC v Total Technology (Engineering) Ltd* [2012] UKUT 418 (TCC) ("*Total Technology*"). In relation to the Appellant's argument that the penalty is unfair, HMRC rely on *HMRC v HOK Ltd* [2012] UKUT 363 (TCC) ("*HOK*"). An insufficiency of funds is not a reasonable excuse (paragraph 16(2)(a) of Schedule 56). A reasonable excuse is normally an unexpected or unusual event that is either unforeseeable or beyond the person's control, and which prevents the person from complying with the underlying obligation. A combination of unexpected and foreseeable events may when viewed together be a reasonable excuse. If the person could reasonably have foreseen the event, whether or not it is within their control, the person should be expected to take steps to meet their obligations. Cash flow constraints can be a reasonable excuse if unforeseen and outside the person's control. Even where there is a reasonable excuse, the person must pay as soon as possible as soon as the excuse ceased. The penalty is due even if the default is remedied before the end of the tax year (paragraph 6(8)(c) of Schedule 56). HMRC does not consider that there are any special circumstances in this case. Once HMRC has shown that the Appellant has failed to pay its tax on time, so that penalties are incurred, the evidential burden shifts to the Appellant to show, on the balance of probabilities, that it has a reasonable excuse, or that there are special circumstances. HMRC submit that the Appellant did not have a reasonable excuse, and that there were no special circumstances.

26. In relation to the argument that not all companies that paid late were subjected to penalties, HMRC is entitled to look at larger penalties first as that is what its resources enable it to do.

27. Ms Weare referred to HMRC telephone records in the documents bundle, which show that the Appellant was advised about the penalty regime by telephone on 29 July 2011, 28 November 2011, 1 February 2012, and 28 February 2012.

28. In reply, Mr Lawes argued amongst other matters that *Total Technology* was distinguishable because it related to VAT rather than to PAYE.

The Tribunal's findings

29. The Tribunal finds that:

- 5 (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;
- (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;
- 10 (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;
- 15 (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.

30. Neither of the parties referred the Tribunal to specific case law on the above matters, but the Tribunal notes in passing that the conclusions above are consistent
20 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).

25 31. The Tribunal notes that the evidence is that HMRC records indicate that HMRC did send the Appellant a letter on 27 May 2011, after the first default (documents bundle, page 35). 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
30 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
35 of PAYE and NIC 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. The letter gave an internet link where information about the penalty regime was available. The Tribunal is also satisfied on the evidence that the Appellant company was sent employer bulletins and other information about the penalty regime
40 before it came into force. The Tribunal is furthermore satisfied on the evidence before it, on a balance of probabilities, that HMRC did advise the Appellant of the penalty regime in the telephone conversations referred to in paragraph 27 above.

32. 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 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. In this case, the Tribunal is not satisfied that there was any reason why the Appellant if acting diligently should have been ignorant of the law.

33. 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 “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. This conclusion is supported by *Total Technology*.

34. In *HOK*, the Upper Tribunal held that the Tribunal does not have the power to discharge a penalty on grounds of unfairness. Even if the Tribunal had this power, it is not persuaded that the penalty regime, or the way that it operated in this particular case, was unfair.

35. The Tribunal does not consider that the failure of HMRC to advise the Appellant during the tax year that it was incurring penalties, as opposed to advising that the Appellant “may” incur penalties, makes it unfair to apply the penalty regime in accordance with the express terms of a statute enacted by Parliament.

36. The Tribunal also does not consider it unfair that not all companies who defaulted were issued with penalty notices. If HMRC does not have the resources to issue penalty notices to all defaulters, it must select those who will be issued penalty notices according to some criterion. The criterion of which companies owed the most amount of PAYE is not an unreasonable one.

37. The Tribunal has considered whether the cost overrun in the construction of the lounge at Heathrow airport could amount to a reasonable excuse or special circumstances. Paragraph 9(2)(a) of Schedule 56 provides that ability to pay cannot be a special circumstance. As to reasonable excuse, paragraph 16(2)(a) provides that insufficiency of funds can only be a reasonable excuse if attributable to events outside the Appellant’s control. The Tribunal finds that events will not be outside a person’s control, for purposes of this provision, if the events are the consequences of a foreseeable business risk voluntarily entered into by the person.

38. On its consideration of all of the evidence in the case as a whole, the Tribunal is not persuaded that the cost overruns in the building of the lounge at Heathrow airport were more than the consequences of a foreseeable business risk voluntarily entered into by the Appellant. Delays caused by the need to obtain board approval for loan drawdowns was not something beyond the Appellant’s control, as the board is part of the Appellant’s own company structure. Delays in the investor making drawdown payments might be something beyond the company’s control, but the Tribunal is not

persuaded on the evidence that the investor acted in a way that was inconsistent with the arrangement freely entered into by the Appellant company, or inconsistent with the Appellant's expectations based on their previous course of dealings. In any event, the evidence of Mr Lawes was that the lounge at Heathrow opened in August 2011. 5 The events during its construction causing the cost overruns must have occurred before then. Even if the full amount of the cost overrun was not known precisely until October 2011, the Tribunal considers that the Appellant should have been aware of a potential shortage of funds prior to August 2011. The Tribunal is not persuaded that the Appellant could not have begun earlier the process of seeking a drawdown, or of 10 seeking a time to pay agreement with HMRC.

39. 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

15 40. For the reasons above, the Tribunal decided to dismiss the Appellant's appeal, and to confirm the penalty imposed.

41. 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 20 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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**DR CHRISTOPHER STAKER
TRIBUNAL JUDGE**

RELEASE DATE: 7 February 2013