



**TC02651**

**Appeal number: TC/2012/06858**

*PAYE – appeal against the penalty imposed for the late payment of PAYE-  
Schedule 56 Finance Act 2009- whether fact that appellant was given no  
specific warning was a reasonable excuse- no – whether lack of knowledge  
was a reasonable excuse – no – whether penalty was unfair – no- appeal  
dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**THE SUFFOLK GATE COMPANY LTD**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE SANDY RADFORD  
HELEN MYERSCOUGH FCA**

**Sitting in public at Norwich on 27 November 2012**

**Mr Jackson, Chairman of the Appellant, for the Appellant**

**Mr Reeve, officer of HMRC, for the Respondents**

## DECISION

1. This is an appeal against the penalty of £4,240.88 imposed for the late payment  
5 of PAYE in each month of tax year 2010/11.

2. The penalty was originally £4,694.17 but reduced as a result of the decision in the *Agar* case.

### Legislation

3. Penalties for the late payment of monthly PAYE amounts were first introduced  
10 for the tax year 2010/11. The legislation is contained in Schedule 56 to the Finance Act 2009 (“Schedule 56”). Schedule 56 covers penalties for non- and late payment of many taxes: paragraph 1(1) (which applies to all taxes) states that a penalty is payable where the taxpayer fails to pay the tax due on or before the due date.

4. Paragraph 6 (which relates only to employer taxes such as PAYE) states that the  
15 penalty due in such a case is based on the number of defaults in the tax year, though the first default is ignored. The amount of the penalty varies as provided by subparagraphs (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 tax comprised in the total of those defaults.

20 (5) If P makes 4, 5 or 6 defaults during the tax year, the amount of the penalty is 2% of the amount of tax comprised in the total amount 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 tax comprised in the total amount of those defaults.

25 (7) If P makes 10 or more defaults during the tax year, the amount of the penalty is 4% of the amount of tax comprised in those defaults.

In this and other paragraphs of Schedule 56 “P” means a person liable to make payments.

5. Under paragraph 11 of Schedule 56 HMRC is given no discretion over levying a penalty:

30 11(1) Where P is liable to a penalty under any paragraph of this Schedule HMRC must –

(a) assess the penalty,

(b) notify P, and

(c) state in the notice the period in respect of which the penalty is assessed.

35 (3) An assessment of a penalty under any paragraph of this Schedule—

- (a) is to be treated for procedural purposes in the same way as an assessment to tax (except in respect of a matter expressly provided for by this Schedule),
- (b) may be enforced as if it were an assessment to tax, and
- (c) may be combined with an assessment to tax.

5 6. Paragraphs 13 to 15 of Schedule 56 deal with appeals. Paragraph 13(1) allows an appeal against the HMRC decision that a penalty is payable and paragraph 13(2) allows for an appeal against the amount of the penalty. Paragraph 15 provides the Tribunal's powers in relation to an appeal which is brought before it:

10 (1) On an appeal under paragraph 13(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 13(2) that is notified to the tribunal, the tribunal may-

- (a) affirm HMRC's decision, or
- (b) substitute for HMRC's decision another decision that HMRC had the power to make.

15 (3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 9-

- (a) to the same extent as HMRC...[...],or
- (b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 9 was flawed.

20 7. Paragraph 9 (referred to in paragraph 15) states:

(1) If HMRC think it right because of special circumstances, they may reduce the 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.

25 (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.

30 8. Paragraph 16 contains a defence of reasonable excuse, but an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control. Nor is it such an excuse where P relies on another person to do anything unless P took reasonable care to avoid the failure; and 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 has ceased.

### **Background and facts**

5 9. The appellant paid all its 12 monthly PAYE payments late during the tax year 2010/11.

10. On 15 July 2011 HMRC issued the appellant with a penalty determination and on 21 November 2011 the appellant appealed to HMRC.

10 11. On 26 March 2012 HMRC issued a review of the matter and concluded that the appellant had no reasonable excuse for the late payments. In its letter HMRC pointed out that a warning letter had been issued on 28 May 2010 informing the appellant that its PAYE payment for month 1 had been late and further late payments could result in a penalty becoming payable.

15 12. Additionally HMRC pointed out that a number of attempts were made to contact the appellant but on only one occasion were they able to speak to Mr Corrie, the managing director of the appellant, when he explained that the late payments were due to cash flow difficulties.

13. HMRC further asserted in its review letter that on three other occasions messages had been left for Mr Corrie to call them back but he had failed to do so.

20 14. This was vehemently refuted by Mr Corrie who attended the hearing and explained that the reason he had not returned the calls was because the PAYE payment had been made by the time that he received the message. On all other occasions he had called back with a forecast payment date and kept to that date.

15. Mr Corrie stated that he was unaware of the new penalty regime and had not seen the Employer bulletins produced by HMRC.

### 25 **Appellant's submissions**

16. Mr Jackson admitted that the payments were late but stated that in the real world money was tight and delays were inevitable.

17. He submitted that whenever the appellant was contacted by HMRC the appellant gave an estimate as to when it would be able to pay the PAYE.

30 18. He submitted that for a new penalty regime the punishment did not fit the crime because it was excessive, unfair and unreasonable.

19. He submitted that proportionality had not been taken into account by HMRC. In the *Agar* case the average delay was 25 to 36 days whereas the appellant's PAYE payments were made on average 7 or 8 days late.

20. Mr Jackson submitted that it was unfair that there was no graduation of the penalty and it was the same whether the payment was made one day or sixty days late.

21. He submitted that a far lighter touch should have been applied by HMRC in the first year of the new regime.

5 22. Finally Mr Jackson submitted that the appellant had not ever received a specific warning regarding the penalties which were arising.

### **HMRC's submissions**

10 23. Mr Reeve submitted that in accordance with paragraph 16 of the Schedule an insufficiency of funds was not a reasonable excuse. In previous years the appellant had paid its PAYE late 47 out of 48 times.

24. He submitted that although Mr Corrie had stated that he was not aware of the new regime ignorance of the law was not an acceptable excuse.

25. Mr Reeve referred to the decision in the case of *Dina Foods Ltd* [2011] UKFTT 709 (TC) in which Judge Berner stated:

15 “having considered the evidence of the information provided by HMRC concerning the introduction of the PAYE and NIC penalties, we are of the view that no reasonable employer, aware generally of its responsibilities to make timely payments of PAYE and NIC amounts due, could fail to have seen and taken note of at least some of the information published and provided by HMRC”

20 26. Mr Reeve also referred to the decision in the case of *Rodney Warren & Co* in which Judge Hellier stated:

“the obligation is to make payment: the lack of warning (or early assessment) of a penalty is not an excuse for failing to make payment”

25 27. Mr Reeve submitted that proportionality arguments were proper to judicial review because they were a challenge to the fabric of the legislation and the judicial review function had not been granted to the First-tier Tribunal. He submitted that this had been confirmed by the Upper Tribunal in the case of *Hok*.

### **Findings**

30 28. The Tribunal found that the appellant had no reasonable excuse for the consistent late payment of the PAYE. We found that the appellant was in the habit of paying late as it had done so regularly in the previous year.

29. We found that in accordance with paragraph 16 of the Schedule an insufficiency of funds was not a reasonable excuse for the late payment.

35 30. We found that the legislation is clear. If a PAYE payment is made late even by one day then in accordance with paragraph 11 of the Schedule HMRC must impose a penalty the rate of which is dictated by the number of late PAYE payments.

31. In the case of *Agar Limited* [2011] UKFTT 773 (TC) which was a similar appeal against the penalty imposed for the late payment of PAYE the decision of the Tribunal was that the penalties were not “plainly unfair” within the meaning of the *Energys* decision and so were not disproportionate.

5 32. We found that the penalty was intended to be harsh and HMRC had no option but to impose the penalty as stipulated by paragraph 11 of Schedule 56.

33. We found that ignorance of the law was not a reasonable excuse.

### **Decision**

34. The appeal is dismissed.

10 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  
15 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

20

**SANDY RADFORD  
TRIBUNAL JUDGE**

**RELEASE DATE: 17 April 2013**

25