



TC03989

Appeal number: TC/2012/00860

*INCOME TAX – PAYE – penalty for late payment – Schedule 56 FA 2009 –
– whether special circumstances – no – appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

FORUM CAFÉ BARS LTD

Appellant

- and -

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

**TRIBUNAL: JUDGE JONATHAN CANNAN
 MR RICHARD CROSLAND**

Sitting in public in Bradford on 27 June 2014

Mrs Michelle Howe of Knowles Warwick Limited appeared for the Appellant

Mr Alan Hall of HM Revenue & Customs appeared for the Respondents

DECISION

Background

1. The Appellant operates a number of cafes and bars. In this appeal it is
5 challenging a penalty for failure to pay PAYE on or before the due date in tax year
2010-11. The total amount of the penalty in issue is £8,535.26. It has been assessed
under Schedule 56 Finance Act 2009 (“FA 2009”).

2. In a previous Tribunal decision (Judge Michael Connell and Ann Christian) the
10 appeal was dismissed ([2013] UKFTT 063 (TC)). The Tribunal had held that there
was no reasonable excuse for the defaults and that the penalty was not
disproportionate. However the decision was set aside on the basis that it contained an
error of law, in particular as to the jurisdiction of the Tribunal in relation to special
circumstances.

3. The appellant challenges the penalty before us on grounds limited to special
15 circumstances. It contends that the respondents (“HMRC”) ought to have allowed a
special reduction pursuant to Paragraph 9 Schedule 56 FA 2009. It argues that there
are “special circumstances” which engage that provision.

4. The issue on this appeal is whether we are satisfied that HMRC’s decision that
there are no special circumstances to justify reduction of the penalty was flawed.

20 *The Penalty Regime*

5. Schedule 56 FA 2009 makes provision for the imposition of penalties for late
payment of certain taxes. By paragraph 1 those taxes include amounts payable under
the PAYE regulations. The penalty is stated to be payable by a person “P” who fails
25 to pay PAYE on or before the date determined by or under PAYE regulations as the
date by which the amount must be paid.

6. Paragraph 6 provides as follows in relation to PAYE and NIC defaults:

“ (1) P is liable to a penalty, in relation to each tax, of an amount determined
by reference to –

- 30 (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
35 one of the following 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 earning-related contributions ...

...

(3) But the first failure during a tax year to make one of those payments ... does not count as a default for that tax year.

...

(8) For the purposes of this paragraph –

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(a) ...

(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.”

7. Paragraphs 6(4) to (7) provide for incremental penalties depending on the number of defaults during the tax year. The penalty is 1% of the amount of tax comprised in the defaults where there are 1-3 defaults in the tax year, 2% in the case of 4-6 defaults, 3% in the case of 7-9 defaults and 4% in the case of 10 or more defaults. The first failure to make a payment in a tax year does not count as a default.

8. It can be seen that paragraph 6(1) creates the liability to a penalty. Paragraph 11 deals with the assessment of that penalty. We shall deal with that paragraph now before returning to paragraphs which deal with ways in which the penalty may be avoided or reduced.

9. Paragraph 11 provides:

“(1) Where P is liable for a penalty under any paragraph of this schedule HMRC must -

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(a) assess the penalty,

(b) notify P, and

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

10. Paragraph 11(1) confers no discretion on HMRC. If a person is liable to a penalty HMRC must assess it.

11. Paragraph 9 deals with the special reduction:

“(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 –

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(a) ability to pay, or

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential overpayment by another.”

12. Where HMRC think it right because of special circumstances they have discretion to reduce a penalty. That could include reducing the amount of a penalty to nil.

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13. Paragraph 16(1) deals with reasonable excuse. It provides that the liability to a penalty does not arise if P satisfies HMRC or the tribunal that “there is a reasonable excuse for a failure to make a payment”. In those circumstances the failure does not attract a penalty and does not count as a default.

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Jurisdiction

14. In the present appeal the appellant argues that the penalty ought to be reduced because of special circumstances. That is an appeal against the amount of the penalty and may be brought pursuant to Paragraph 13(2) Schedule 56. Paragraph 15(2)
10 provides that on such an appeal the tribunal may affirm HMRC’s decision or substitute another decision that HMRC had power to make. However, if we substitute our decision, Paragraph 15 further provides as follows:

“(3) ...the tribunal may rely on paragraph 9 –

15 (a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), 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.

(4) In sub-paragraph (3)(b) “flawed” means flawed when considered in the light of the principles applicable in proceedings for judicial review.”

20 15. The reference to judicial review makes it clear that the appellant must satisfy us that the decision taken by HMRC in relation to special circumstances:

(1) failed to take into account a relevant factor, or

(2) took into account an irrelevant factor, or

(3) involved an error of law, or

25 (4) was a decision which no reasonable body properly instructed as to the law could have reached.

16. It is not sufficient that we would have come to a different decision to that reached by HMRC.

30 *Findings of Fact*

17. There was no dispute between the parties as to the factual basis of the appeal. Indeed the basis on which the appeal was presented means that we can state our findings of fact quite briefly.

35 18. In 2010-11 the appellant was late paying its PAYE and NIC liability. The following table of defaults was agreed:

Amount on which Penalty Calculated £	Due Date	Days Late	Penalty at 3% £
	19 May 2010	19	
	19 June 2010	3	
23,474.69	19 July 2010	1	704.24
32,496.70	19 Aug 2010	5	974.90
23,263.98	19 Sept 2010	2	697.92
27,632.46	19 Oct 2010	7	828.97
39,737.10	19 Nov 2010	11	1,192.11
30,082.19	19 Dec 2010	2	902.47
36,182.57	19 Jan 2011	3	1,085.48
36,271.49	19 Feb 2011	3	1,088.14
35,367.57	19 March 2011	3	1,061.03
314,780.53			8,535.26

19. We are not concerned with reasonable excuse and the special circumstances relied on by the appellant in this appeal do not require us to consider the reasons why the appellant was late in making payments.

Decision

20. Mrs Howe who appeared for the appellant submitted that the purpose of penalties under Schedule 56 was to encourage compliance by taxpayers. Historically, some employers had paid no PAYE during the year and had only made payment at the end of the year. Such employers had an unfair advantage over compliant taxpayers. We accept that submission.

21. The basis of Mrs Howe's submission that there are special circumstances to justify a special reduction in the penalty was that Parliament had intended that penalties should only apply under Schedule 56 where payment was made more than 30 days after the due date.

22. Mrs Howe's submission is inconsistent with the express wording of paragraph 1(4) Schedule 56 which provides in relation to PAYE at Item 2 that the date after which a penalty is incurred is "*the date determined by or under PAYE regulations as the date by which the amount must be paid*".

23. Mrs Howe referred us to extracts from Hansard covering debates on the Finance Bill 2009 in support of her submission. She sought to identify in that material an intention that penalties should not be triggered until 30 days after the due date for payment. She submitted that penalties in respect of PAYE, where a default is

triggered even where payment is one day late, were inconsistent with the intention of Parliament.

24. Mrs Howe was unable to point to any ambiguity, obscurity or absurdity in the terms or effect of Schedule 56 that would justify us considering extracts from Hansard. The intention of Parliament can only be derived from the wording of Schedule 56 itself. In the absence of any ambiguity, obscurity or absurdity it is not permissible to conduct a general review of Parliamentary debates to ascertain a different intention where the intention is clear from the statute - *Pepper v Hart* [1993] AC 593.

25. Mrs Howe submitted that the strict application of the penalty law in the present case gave a result which was contrary to the clear compliance intention of Schedule 56. She went so far as to submit that the result of Schedule 56 in relation to PAYE and NIC in applying a penalty where the default was only one day after the date for payment was absurd. We do not accept that submission. There is nothing absurd in levying a penalty by reference to defaults taken from the due date for payment.

26. It is notable that the penalty in relation to deductions from payments to sub-contractors (Item 4) is also by reference to the date of payment. Similarly, in amendments to Schedule 56 incorporating various other miscellaneous taxes into the Schedule 56 penalty regime the date after which a penalty is incurred is the date payment fell due. See for example Items 11A and 11C which relate to Aggregates Levy and Landfill Tax respectively.

27. Mr Hall pointed us to paragraph 2A Schedule 56 which was inserted by Finance (No 3) Act 2010. It states that provision may be made by PAYE regulations for a penalty date later than that specified in paragraph 1(4). No such regulations have been made. Further, in paragraphs 5-8 Schedule 56 specific provision is made for the operation of penalties in relation to PAYE, NIC and sub-contractor deductions. Given the nature of the way in which tax is accounted for by deduction in those cases it is clear that Parliament was making specific provision for penalties in relation to such taxes.

28. We were referred to various HMRC manuals as to the meaning of special circumstances. In particular HMRC's compliance handbook states at CH170100:

“... Special circumstances are either:

- uncommon or exceptional, or
- where the strict application of the penalty law produces a result that is contrary to the clear compliance intention of that penalty law.”

29. HMRC's manuals reflect their view as to the meaning of the term special circumstances, but they do no more than that. Mr Hall gave as an example of the second bullet point circumstances where a penalty is triggered without any reasonable excuse but some failure on the part of HMRC led to the default.

30. In our view the compliance intention of Schedule 56 is clear. The penalty is there to encourage compliance with the obligation to make payments on time. The result of applying penalties in the present case is not at all contrary to the compliance intention of Schedule 56. We have reached the same decision that we came to in
5 *Knowles Warwick Ltd v Commissioners for HM Revenue & Customs [2014] UKFTT 222 (TC)*.

31. It follows, for the reasons given above, that HMRC were entitled to conclude that there were no special circumstances. It cannot be said that their decision was in any way unreasonable or irrational. We are not satisfied therefore that their decision
10 on special circumstances was flawed.

32. In the circumstances we must dismiss the appeal.

33. 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
15 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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**JONATHAN CANNAN
TRIBUNAL JUDGE**

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RELEASE DATE: 8 September 2014