



TC04349

Appeal number: TC/2014/03133

Penalty – late payment of PAYE and NICs (FA 2009 Sch 56) – Whether a reasonable excuse for late payment – Whether “special circumstances” justifying a special reduction – Appeal allowed in part

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

THE BUNKER SECURE HOSTING LIMITED **Appellant**

- and -

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

**TRIBUNAL: JUDGE CHRISTOPHER STAKER
MR JOHN ROBINSON**

Sitting in public in Ashford on 10 December 2014

Mr S Jones, Financial Controller of the Appellant

Mrs Murphy, Presenting Officer, for the Respondents

DECISION

Introduction

1. This is an appeal against a penalty assessment of £25,699.23 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 2013. At the end of the hearing of this appeal on 10 December 2014, the Tribunal issued directions allowing the Appellant to submit additional material in support of the appeal. Following the submission of further material by the Appellant on 31 December 2014, HMRC informed the Tribunal in an e-mail dated 27 January 2015 that HMRC is now prepared to accept that the payment for month 3 of the year in question was paid on time. In the light of that concession, the Tribunal allows the appeal in relation to month 3, and proceeds to determine the appeal in relation to the other months in issue.

The relevant legislation

2. 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 day after the date specified in or for the purposes of column 4 of the Table in relation to that amount.

	<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

3. Paragraph 5 of Schedule 56 states that paragraph 6 of Schedule 56 applies in the case of a payment of tax falling within item 2 or 4 in the Table.

4. Paragraph 6 of Schedule 56 sets out the applicable penalty regime.

5. Paragraph 9 of Schedule 56 states as follows:

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

6. Paragraph 16 of Schedule 56 states as follows:

- (1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a payment if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.
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- (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,
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- (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
- 30
- after the excuse ceased.

7. 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. Paragraph 15(3) and (4) provides that if the Tribunal substitutes its decision for HMRC's decision, the Tribunal may rely on paragraph 9 to a different extent, but only if it thinks that HMRC's decision in the application of paragraph 9 was flawed when considered in the light of the principles applicable in judicial review proceedings.

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The hearing, evidence and arguments

8. HMRC produced for the hearing a penalty calculation (page 25 of the documents bundle), which is materially identical to the penalty calculation in the penalty notice against which the Appellant appeals (page 17 of the documents bundle). This revised
5 penalty takes account of the decision in *Agar Ltd v Revenue & Customs* [2011] UKFTT 773 (TC). In accordance with the legislation, the late payment in the first month of the year does not count towards the penalty.

9. There was no dispute between the parties as to the amount of PAYE and NIC required to be paid by the Appellant in each of the months in question, or as to the due
10 date for each of the payments. The Appellant does not accept that all of the payments claimed by HMRC to be late were indeed late. Apart from this, and apart from the issues of the potential application of paragraphs 9 and 16 of Schedule 56, there is no dispute as to the calculation of the penalties.

10. The principal arguments in the Appellant's notice of appeal are as follows. The 5
15 February 2014 letter from HMRC, advising that the penalty had been imposed, was the first that the Appellant had received relating to late payments. The Appellant had not previously received information about late payments, and had it done so, it would have ensured that payment was sent in a timely manner. The Appellant has paid all its liabilities to HMRC in full. Payments have only been late by a matter of days due
20 to the complexity of getting a second authorisation. It is disputed that HMRC warned the Appellant about penalties in telephone conversations during 2012, as claimed by HMRC. It is denied that the Appellant received from HMRC employer packs or a late payment notice. The Appellant was not aware of the penalties for late payment, and many employers are in a similar situation. The penalty should be either cancelled or
25 reduced.

11. The position taken in the HMRC statement of case is as follows. Under the legislation, late payment penalties apply even if the payment is only a day late. Employers are expected to pay on time without warning. Information is contained in employer packs sent to employers, and on the HMRC website, and the late payment
30 penalty regime was publicised before and after it came into effect. Employers are sent a late payment warning letter the first time that a payment is late in a given year. Such a letter was sent to the Appellant on 30 July 2012. HMRC records indicate that such letters were also sent to the Appellant in relation to late payments in previous years, on 28 May 2010 and 27 May 2011. HMRC records also indicate that verbal
35 warnings about penalties were given to the Appellant in telephone conversations on 27 March 2012, 28 May 2012 and 27 June 2012. It is the responsibility of employers to remain up to date with changes in the legislation. Reliance was placed on *Dina Foods Ltd v Revenue & Customs* [2011] UKFTT 709 (TC) ("*Dina Foods*"). Difficulties obtaining a second authorisation are not a reasonable excuse: an
40 employer can be expected either to have a plan to ensure payment is made on time or to contact HMRC to request a time to pay agreement. The Appellant made no effort to enter into a time to pay agreement.

12. At the hearing, the Appellant's case was presented by its Financial Controller, Mr Jones, and Ms N Roda of the Appellant gave evidence as a witness. The Appellant's

evidence was that it had not received warning letters referred to in the HMRC records contained in the hearing bundle. The Appellant also contended that the number of defaults would have been fewer than contended by HMRC if payments had been allocated correctly. It was denied that the Appellant recollected being warned about penalties in conversations with HMRC. It was confirmed that the Appellant was not relying as such on the problems with obtaining a second signatory. It was confirmed that the Appellant was at all material times aware of the due date for payment. It was stated that since the penalty notice in dispute, the Appellant has consistently paid on time or early, and that the Appellant has learned from its mistakes.

10 13. As noted above, at the end of the hearing of this appeal on 10 December 2014, the Tribunal issued directions allowing the Appellant to submit additional material in support of the appeal. On 31 December 2014, the Appellant submitted a bank statement showing that two payments to HMRC were debited from the Appellant's account on 20 July 2012.

15 14. HMRC submitted a response on 22 January 2015, contending that the due date for the July payment was 22 July 2012, which was a Sunday, such that payment needed to be with HMRC on Friday 20 July 2012. The payment was made by the BillPay procedure, which requires activation three days before the due date. A copy of a page from the HMRC website advising employers of this was submitted.

20 15. The 31 December 2014 submission from the Appellant also foreshadowed that the Appellant would be forwarding additional material to the Tribunal. The Tribunal's direction granted the Appellant until 31 December 2014 to submit further material. No further material has since been received from the Appellant. The Tribunal has decided that it will not grant the Appellant further time to submit any further material.

25 16. In the bundle are various HMRC records, which indicate the following. Penalty default letters were issued to the Appellant on 28 May 2010 and 27 May 2011. A "penalty 2 2nd default letter" was issued to the Appellant on 30 July 2012. P30B letters, which advised in the version used at the relevant time that penalties may be charged if payment was not made in full and on time, were issued to the Appellant on 8 January 2012 and 6 January 2013. Advice about late payment penalties was given by HMRC in a telephone call with Ms Roda on 27 March 2012, and in telephone calls with Mr Jones on 28 May 2012. IDMS99 letters, which warn the addressee that "You may be charged a penalty if you pay late more than once during the tax year", were issued to the Appellant on 24 February 2012, 23 May 2012 and 19 June 2012.

35 **The Tribunal's findings**

17. HMRC have now conceded that the payment in month 3 was on time, and the Tribunal has accordingly allowed the appeal in relation to month 3 (see paragraph 1 above).

40 18. For the reasons given by HMRC, the Tribunal does not accept that the July 2012 payment was on time (see paragraphs 13-14 above). The Tribunal is satisfied on the evidence that payment was late in the remaining months that have been counted by

HMRC towards the penalty. The evidence before the Tribunal in this appeal does not indicate that payment was late in any of these months due to allocation mistakes on the part of HMRC.

19. The Tribunal finds that:

- 5 (1) the scheme laid down by Schedule 56 of the Finance Act 2009 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;
- 10 (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;
- 15 (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.

20 20. The conclusions above are consistent with those reached by the Tribunal in other cases: *Dina Foods*; *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); *Stella Rosa (Contractors) Ltd v Revenue & Customs* [2014] UKFTT 898 (TC).

25 21. Despite the evidence of the Appellant that it did not receive the letters referred to in paragraph 16 above, the Tribunal finds on the evidence on a balance of probabilities that these letters were sent and received by the Appellant, whether or not they were actually read or remembered by anyone at the Appellant company. The Tribunal is also satisfied that HMRC gave warnings of possible penalties in the
30 telephone conversations referred to in paragraph 16 above. The Appellant should therefore from the outset have been aware of the potential for penalties for late payments from the warning letters sent in previous years. The Tribunal considers that a reasonable employer, aware generally of its responsibilities to make timely payments of PAYE and NIC amounts due, would have taken steps if necessary to
35 obtain any further information about the penalty regime and available options in the event that the Appellant was unable to pay on time.

22. The Tribunal is also satisfied on the evidence that the Appellant company was sent employer bulletins and other information about the penalty regime before it came into force.

23. In any event, 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. The Appellant accepts that it was at material times aware of the due date for payment. Where a
5 person is aware of a legal obligation to pay tax by a particular date, it is not a reasonable excuse for failing to comply with that legal obligation that the person is unaware of the penalties that will apply to such a failure. Nor would this be a special circumstance justifying a reduction in the penalty.

24. For the reasons above, the Tribunal is not satisfied on the evidence that there is a
10 reasonable excuse for the late payments.

25. In its letter dated 10 March 2014, HMRC concluded that there are no special circumstances that would allow HMRC to reduce the penalty. The Tribunal is not persuaded that that decision of HMRC is flawed.

26. The Tribunal agrees, for the reasons given in *Dina Foods*, that the penalty regime
15 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 *HMRC v Total Technology (Engineering) Ltd* [2012]
20 UKUT 418 (TCC).

27. In *HMRC v HOK Ltd* [2012] UKUT 363 (TCC), 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.

25 **Conclusion**

28. For the reasons above, the Tribunal allows the appeal in relation to month 3 of 2012, but otherwise dismisses the appeal. The Tribunal leaves it to HMRC to recalculate the amount of the penalty accordingly. Should the Appellant dispute HMRC’s recalculation in accordance with this decision, the Appellant may apply to
30 the Tribunal to determine the amount of the penalty.

29. 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
35 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**

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