TC02249

Appeal number: TC/2011/10099

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

BRIGHT MATTER LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER STAKER
MS SUSAN HEWETT

Sitting in public in Southampton on 25 July 2012

Mrs E Clark and Mr R Watts of the Appellant

Mrs J Carwardine for the Respondents

DECISION

Introduction

1. This is an appeal against a penalty assessment (as amended) of £1,357.93 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 Southampton on 25 July 2012. The Tribunal gave its decision orally at the end of the hearing. At the hearing, the Appellant requested full reasons for the decision, 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.

	Tax to which payment relates	*Amount of tax payable*	*Date after which penalty is incurred*
PRINCIPAL AMOUNTS			
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.
>
> (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:

(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.

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,

(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),

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, Mrs Clark and Mr Watts of the Appellant company presented the Appellant's case. HMRC was represented by Mrs Carwardine.

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. At the hearing, Mrs Clark acknowledged that she was at all material times aware of the deadline.

14. HMRC produced for the hearing a revised penalty notice dated 11 April 2012. This revised penalty notice revised the amount of the penalty previously imposed to take account of the decision in *Agar Ltd v Revenue & Customs* [2011] UKFTT 773 (TC). The revised penalty notice in calculated on the basis that the effect of that decision is 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. The Appellant did not take issue with the stated amounts of PAYE and NIC required to be paid by the Appellant in each of the months. However, the Appellants did not accept that the details in the table were necessarily correct in relation to the dates that payments were received by HMRC or in relation to the number of days that payments were late. Evidence of the dates of each payment was not before the Tribunal at the hearing, and Ms Carwardine said that it would not be possible for such evidence to be produced on the day of the hearing.

16. It was however not disputed by the Appellant that some of the payments during the year in question were late.

17. The arguments in the Appellant's notice of appeal are as follows. HMRC acted in an unreasonable manner by not informing the Appellant in writing that they had incurred a penalty. Other written communications during the year did not mention a penalty charge. All verbal communications stated that a penalty "may" be charged, not that a penalty "would" be charged. When a written communication was received informing the company that a penalty had been charged, the Appellant immediately sought the help of its bankers to rectify the late payment situation.

18. At the hearing, the arguments and evidence advanced on behalf of the Appellant included the following. The Appellant acted on the basis of 30 years' experience of dealing with HMRC. The Appellant is a small company employing only 3 PAYE employees. At the end of the year, the interest on overdue payments was only some £8, indicating that payments were not overdue for long. Communications from HMRC only ever said that a penalty "may" be charged. The Appellant was never informed until after the end of the year in question that a penalty *would* be charged. Had HMRC informed the Appellant that a penalty had been incurred at the time of the first late payment that counted as a default, the Appellant would have taken steps to ensure that there were no further defaults that year. Monthly reminders issued in respect of late payments never mentioned penalties. In the past, HMRC had never charged penalties for late payments. The Appellant was unaware that HMRC's approach had changed. In phone calls, HMRC only ever informed the Appellant that they had the right to impose penalties, not that penalties would be imposed. While the tone of the phone calls was harsher than in the past, the HMRC officials never said that a penalty had been incurred. The Appellant does not recall receiving a letter after the first late payment of the year advising that the payment had been late and that any further late payments may incur a penalty. The first time that the Appellant was informed that a penalty had been incurred was in the notification of 13 July 2011. Even if HMRC would not know the final amount of a penalty until the end of the year in question, it would know at the time of the first late payment that counted as a default that there would be a penalty and the minimum amount of the penalty, and HMRC could at that time have informed the Appellant accordingly. The Appellant simply did not know that any penalty had been incurred at all until after the end of the

tax year. If the Appellant had known this immediately after the first late payment that counted as a default, the Appellant would have taken immediate remedial action.

19. For HMRC, Ms Carwardine submitted amongst other matters as follows. HMRC records show that after the first late payment of the year, the Appellant was sent a letter on 28 May 2010 advising that the payment had been late, that any further late payments may incur a penalty, and giving an internet address at which further information about the penalty regime could be found. The tax year in question was the first time that the new penalty regime operated. Previously, there were no penalties for such late payments by small businesses. Prior to the coming into force of the new regime, information about it was sent to employers in employer bulletins, and there was other publicity by HMRC.

The Tribunal's findings

20. The Tribunal finds that:

(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;

(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.

21. 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).

22. The Tribunal notes that the evidence is that HMRC did in fact send the Appellant a letter in May 2010, after the first default. 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.

23. 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.
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> 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, 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 the State in this respect. Accordingly we find that no Convention right has been infringed and the appeal cannot succeed on that basis.

24. 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. 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.

25. The Tribunal does not consider that the failure of HMRC to advise the Appellant 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.

26. 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.

27. As noted above, there was no evidence before the Tribunal as to the actual dates of payment in respect of each of the relevant months, although it is accepted that at least some of the payments were late. The number of late payments will affect the amount of the penalty imposed. The Tribunal therefore leaves it to the parties to confirm this between themselves. If there is any remaining disagreement between the parties as to which months the payments were late, the matter can be brought back before the Tribunal for determination.

Conclusion

28. For the reasons above, the Tribunal dismisses the appeal subject to the issue of which months the payments were late. This appeal is stayed for two months, with liberty to either party to restore the matter before the Tribunal if this issue cannot be agreed between the parties.

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 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.

DR CHRISTOPHER STAKER
TRIBUNAL JUDGE

RELEASE DATE: 29 August 2012