



**TC03006**

**Appeal number: TC/2013/02254**

*Income Tax – late payment penalties – Paragraphs 3(2) and 3(3) of  
Schedule 56 Finance Act 2009 – reasonable excuse – no - proportionality –  
no - appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**CHARLOTTE GAYNOR**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: G. NOEL BARRETT LLB (Presiding Member)**

**The Tribunal determined the appeal on 13<sup>th</sup> September 2013 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal which is dated 29<sup>th</sup> March 2013, HMRC's Statement of Case submitted on 23<sup>rd</sup> July 2013 and the previous directions issued in respect of the appeal.**

## DECISION

### *Introduction*

- 5 1. This is an appeal against two late payment penalties for late payment of self-  
assessment tax due on the Appellant's self-assessment tax return for the tax year  
2010-11, which return was received electronically by HMRC on 8<sup>th</sup> August 2012. The  
first penalty in the sum of £436 was calculated at the rate of 5% of the tax remaining  
outstanding (£8,720), after the expiry of 30 days from the due date (31<sup>st</sup> January  
10 2012); and the second penalty in the sum of £436 was calculated at the rate of 5% of  
the tax then remaining outstanding after the end of the period of 5 months from the  
penalty date (2<sup>nd</sup> March 2012). The Appellant's payment was not actually received by  
HMRC until 25<sup>th</sup> September 2012.
- 15 2. The Appellant appeals on the basis firstly that she has a reasonable excuse for the  
late payment and secondly on the grounds of unfairness or proportionality as to the  
amount of the penalty.

### *The Law*

- 20 3. The Taxes Management Act 1970 ("TMA") section 8 states that a person issued  
with a Self-Assessment return must return it to HMRC on or before 31 October after  
the end of the tax year in question (if it is filed on paper) or on or before 31 January  
after the end of the tax year in question (if it is filed electronically), "the specified  
date".
- 25 4. The provisions of paragraphs (1)1 and (1)4 of Schedule 56 Finance Act (FA)  
2009 operate such that a penalty is payable where the tax payer fails to pay an amount  
of tax 30 days after the specified date, the "penalty date".
5. The provisions of paragraph 3(2) Schedule 56 FA 2009 set the rate of the penalty  
payable under paragraph 1(1) at 5%.
- 30 6. Paragraphs 3(3) and 3(4) Schedule 56 FA 2009 impose a further penalty at the  
rate of 5% of any amount of tax unpaid after the end of the period of 5 months after  
the penalty date.
7. Under paragraph 9 of schedule 56, FA 2009, if HMRC find that there are special  
circumstances they may reduce the penalty, but special circumstances does not  
35 include ability to pay.
8. Paragraph 9 of schedule 56, FA 2009 states:-
- 40 "Failure to make a payment will not give rise to a penalty if the tax payer  
satisfies the tribunal that there is a reasonable excuse for the failure. But an  
insufficiency of funds is not a reasonable excuse unless attributable to events  
outside the tax payers control. Nor is it an excuse where the tax payer relies  
on another person to do anything unless the tax payer took reasonable care to

avoid the failure; and where the tax payer had a reasonable excuse for the failure but the excuse has ceased, the tax payer is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse has ceased.

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### *The Evidence and my Findings of Facts*

9. I was provided with the correspondence between the parties, the Appellant's  
10 Notice of Appeal dated 29<sup>th</sup> March 2013 and HMRC's Statement of Case submitted  
on 23<sup>rd</sup> July 2013. The Appellant did not file a reply to HMRC's Statement of Case. I  
was also provided with a copy of the Directions issued on the 18<sup>th</sup> June 2013 together  
with specimen generic copies of information available to Tax Payers from HMRC's  
web site on Self-Assessment.

15 10. In view of the apology and admission of late filing and late payment contained  
within the Appellant's Accountant's letter of 8<sup>th</sup> August 2012, I find that there is no  
dispute by the Appellant as to the facts of the late filing or late payment.

11. Therefore the matters to be considered and determined are firstly as to whether  
any special circumstances arise; secondly as to whether the Appellant has a  
20 reasonable excuse for late filing and late payment; and thirdly as to whether the  
penalties, as in the Appellants submission, are disproportionate or unfair.

### *Special Circumstances*

25 12. Whilst the legislation does not define special circumstances, it is accepted that for  
circumstances to be special they must be as per Viscount Dilhorne at 983 in *Crabtree  
v Hinchcliffe (Inspector of Taxes) [1971] 3 AER 967* "exceptional abnormal or  
unusual". Or as Lord Justice Lane said in *Clarkes of Hove Ltd v Bakers Union [1979]  
AER 152* "something out of the ordinary run of events"

30 13. I do not accept that there are any such special circumstances in this matter which  
HMRC ought to have taken into account. The facts are indeed very straightforward, as  
submitted by the Appellant's accountants:-

35 " it was her (sic the Appellant's) understanding, albeit wrong, that her tax was  
deducted at source and hence she did not realise that a tax return would be  
required of her"

14. There was nothing in my finding, "exceptional abnormal or unusual", or  
"something out of the ordinary run of events", about the Appellants mistaken belief or  
understanding in these circumstances.

### ***Reasonable Excuse***

15. The burden of proving reasonable excuse rests upon the Appellant.

16. The standard of proof is upon the balance of probabilities.

5 17. There is no statutory definition of what amounts to a reasonable excuse, however  
I accept as has been generally established that a reasonable excuse is normally an  
unexpected or unusual event which is either unforeseeable or beyond the tax payer's  
control and which prevents the tax payer from complying with their obligation. I  
further accept that in certain cases a combination of unexpected and foreseeable  
10 events may, when viewed together, amount to a reasonable excuse.

18. It is unfortunate that the Appellant choose not to file a reply to HMRC's  
Statement of case and also unfortunate that the Appellant did not produce any  
evidence, from her Bank or otherwise, in support of her misunderstanding about her  
interest being taxed at source.

15 19. The Appellant received interest amounting to £49,937, on what must have been  
sizeable capital investments. I accept HMRC's submission that the Appellant ought to  
have been able to calculate, or at the very least notice, whether tax had or had not  
been deducted at source from this sum – the difference, being the amount assessed, in  
the sum of £9,361.29. Furthermore the Appellant's bank statements should have  
20 confirmed to the Appellant whether or not interest had or had not been deducted at  
source.

20. The Appellant further submitted that she had been going through;

“ long and arduous divorce proceedings”

since March 2011 which had;

25 “impacted on her state of mind and ability to run her financial affairs as  
efficiently as she might ordinarily have done”

21. Unfortunately again, no evidence has been provided by the Appellant as to when  
those divorce proceedings actually commenced or when they were concluded, nor as  
to what, if any professional advice the Appellant received during those on-going  
30 divorce proceedings, nor as to what effect, if any, the divorce proceedings had on the  
Appellant's cognitive ability.

22. I accept that matters such as divorce can impact, on some individuals very  
seriously and affect an individual's ability to reason and run their affairs as effectively  
as otherwise. The Appellant however has provided no evidence of the effect on her,  
35 other than that briefly contained in her application for this Appeal; and the details  
contained in her accountant's letter of the 8<sup>th</sup> August 2012.

23. The Appellant has not in this appeal for the reasons that I have provided  
established, on the balance of probabilities, that she has a reasonable excuse for late  
submission and/or late payment.

## ***Proportionality***

24. I accept that the amount of the penalty imposed may seem to the Appellant harsh. However I do not believe that the penalty is either “plainly unfair” in the terms of the earlier case of *Energys Holdings UK Limited v HMRC [2010] UKFTT 20*, nor in my opinion is the penalty devoid of reasonable foundation. The penalty has been imposed by HMRC strictly in accordance with the legislation as enacted by Parliament, and the penalty itself increases proportionally with the length of the defaults. I am not satisfied therefore that the penalty imposed is in any way disproportionate.

25. The purpose is to penalise tax payers for not paying by the due date.

26. As the tribunal in *Dina Foods Ltd v HMRC [2011] UKFTT 709 (TC)* observed at [41] and [42] and which we follow;

*“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.*

*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.”*

27. Furthermore as recently decided by the Upper Tribunal in *Hok v HMRC [2012] UKUT 363 (TCC)* at paragraph 41, which I again follow, this tribunal has in any event no judicial review function, nor can this tribunal apply principles of common law in determining the penalty. As such this tribunal cannot therefore interfere with the penalties laid down by Parliament simply on the grounds of unfairness. The Upper Tribunal confirmed at paragraph 56 of their decision in *Hok* that;

