



**TC03665**

**Appeal number: TC/2013/01852**

**Income tax –late payment penalty-whether reasonable excuse –no – appeal dismissed.**

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**JOHN WILLIAMSON**

**Appellant**

**- and -**

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

**TRIBUNAL: DR KAMEEL KHAN  
MR MICHAEL SHARP, FCA, FIH, FIOD**

**Sitting in public in Bedford Square, London on 16 April 2014**

**Mr John Williamson appeared for the Appellant**

**Mr S Goulding, Presenting Officer, assisted by Mr Jeremy Taylor, instructed by  
the General Counsel and Solicitor to HM Revenue and Customs, for the  
Respondents**

## DECISION

### Introduction

- 5 1. The matter before the Tribunal is an appeal by the employer, Mr J K Williamson, trading as The London Door Company against a penalty determination issued by HMRC on 16 July 2016. The penalty was incurred on Schedule 56, Finance Act 2009.

### Background Facts

- 10 (1) The Appellant failed to pay 11 monthly PAYE payments on time in 2011-2012. The resulting penalty of 4% was levied with regard to 10 defaults in the amount of £11,809.24.
- (2) The first default was on 5 May 2011 and the second on 5 June 2011. There is no penalty for the first default. However, due to a technical  
15 problem the PAYE penalty default letter was not issued until 29 June 2011 which is after the second PAYE default. This meant that the PAYE penalty for the first month was reduced to nil as the Appellant had not been aware of their first default till month 2. In addition, there was an overpayment for the year 2010-11 which operated to reduce the charges  
20 for the year 2011-12. This meant that the percentage which applied to the penalty was reduced from 4% to 3% and the total amount of penalty charge was consequently reduced to £7,857.15.
- (3) HMRC offered a review on 22 August 2012 which was accepted on 4  
25 December 2012. The review concluded on 4 February 2013. It revised the penalty amount to £7,857.15. Therefore while the penalty was varied the penalty itself was upheld. A reasonable excuse was accepted for months 1 and 2 leaving 8 defaults which attracted a penalty at the rate of 3%.
- (4) An appeal was made to the Tribunal by Michael Ollerenshaw & Co on 6  
March 2013. There were no stated grounds of appeal.

### 30 Legislation

2. The relevant legislation is contained in Finance Act 2009, Schedule 56. Paragraph 1 of Schedule 56 states as follows:

- 35 (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 sets 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.

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(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).

The table lists numerous various categories of taxes of which those referred to in Row 2 (as shown in the extract from the Table below) are relevant to this appeal.

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	Tax to which payment relates	Amount of tax payable	Date after which penalty is incurred
	<b>PRINCIPAL AMOUNTS</b>		
1	<b>Income tax</b> 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	<b>Income tax</b>	Amount payable under PAYE Regulations ...	The date determined by or under PAYE Regulations as the date by which the amount must be paid
3	<b>Income tax</b>	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

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 above.

Paragraph 6 of Schedule 56 states as follows:

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(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-paragraph (2) and (3)), and
  - (b) the amount of that tax comprise in the total of those defaults (see sub-paragraphs (4) to (7)).
- 5 (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;
  - 10 (b) a payment of earnings-related contributions within the meaning of the Social Security (contributions) Regulations 2001 (SI 2001/1004);
- 15 (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.
- 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 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.
- 25 (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 –
- 30 (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.
- 35 (9) The Treasury may by order made by statutory instrument make such amendments to sub-paragraph (2) as they think fit in consequence of any amendment, revocation or re-enactment of the regulations mentioned in that sub-paragraph.

Paragraph 9 of Schedule 56 allows HMRC to reduce a penalty if special circumstances exist. Paragraph 9 states as follows:

- 40 (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 –

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(a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty.

Paragraph 10 of Schedule 56 states as follows:

(1) This paragraph applies if –

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(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

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(c) HMRC agrees that payment of that amount may be deferred for a period (“the deferral period”).

Paragraph 11 states in mandatory terms that HMRC must levy a penalty where P is liable: 11(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.

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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. The Tribunal’s powers are laid down in paragraph 15:

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(15(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 –

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(a) affirm HMRC’s decision, or

(b) substitute for HMRC’s decision another decision that HMRC had power to make.

(3) If the tribunal substitutes its decision for HMRC’s, the tribunal may rely on paragraph 9.

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(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.

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

(5) In this paragraph "tribunal" means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 14(1)).

10 As observed in *Dina Foods Limited*, [TC01546] under paragraph 15 the Tribunal is given power: 'to confirm or cancel the penalty, or substitute for HMRC's decision another decision, but only one that HMRC had the power to make. The Tribunal can only rely upon the "special circumstances" provision in paragraph 9 to a different extent than that applied by HMRC if it thinks that HMRC's  
15 decision in that respect was flawed. Applying judicial review principles, the Tribunal must consider whether HMRC acted in a way that no reasonable body of commissioners could have acted, or whether they took into account some irrelevant matter or disregarded something to which they should have given weight. The Tribunal should also consider whether HMRC have erred on a point of law.'

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Under paragraph 16 of Schedule 56, the Appellant may escape liability for a penalty if the Tribunal is satisfied that there was a reasonable excuse.

Paragraph 16 of Schedule 56 states as follows:

25 (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

30 (b) the failure does not count as a default for the purposes of paragraph 6.

(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,

35 (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

40 (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.

In considering a reasonable excuse the Tribunal examines the actions of the Appellant from the perspective of a prudent taxpayer exercising reasonable foresight and due diligence and having proper regard for its responsibilities  
45 under the Taxes Acts.

The operation of Schedule 56 was considered in *Dina Foods*. It was observed that:

- 5 (1) the legislation became operative with a commencement date of 6 April 2010, so that the first time penalties could be raised under these rules was after the end of the 2010/11 tax year, given the way that the penalties talk in terms of the number of defaults during the year in question (at [11]);
- 10 (2) except in the case of special circumstances, the scheme laid down by the statute gives no discretion; the rate of penalty is simply driven by the number of PAYE late payments in the tax year by the **employer** (at [31]);
- 15 (3) the scheme of the PAYE legislation requires taxpayers to pay over PAYE on time; 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 (at [33]);
- 20 (4) 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 (at [37]);
- 25 (5) 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 (given that there is no separate penalty for each individual default, and the penalty can only be assessed once the aggregate of the late paid tax comprised in the total of the defaults for a particular tax year has been ascertained) (at
- 30 [38]-[39]).

### **Submissions by the Appellant**

- (1) The Appellant made no written submissions in their Notice of Appeal.
- 35 (2) The Appellant does not rely on a reasonable excuse based on an insufficiency of funds or reliance on a third party.
- (3) The Appellant contends that payments made by cheque and posted with the payslip to HMRC were made in time. He says that the cheques cleared his bank account within a few days of the due date.
- 40 (4) The Appellant also say that they did not receive a warning letter prior to the penalty surcharge notices. At the hearing, the Appellant acknowledged that his payments were late but they were not “very late”.

(5) The Appellant also stated that he was confused about the warning notices. He did not know that the information received was in fact warning notices which were given.

5 (6) While he acknowledges that it was his intention to pay on time, he thought that payments had to be made at the end of the month. He was not entirely familiar with the system for paying the taxes since his bookkeeper prepared all the returns and figures and he simply wrote a cheque out and signed it.

### **The Respondents' submissions**

10 (1) That the payments were made late. This is a question of fact. HMRC provided evidence from their ledger showing that the relevant payments were made late. The number of days late ranged between 2 and 9 days.

(2) HMRC say that while the legislation does not require warnings the notices did contain warnings to the Appellant.

### **Conclusion**

15 3. HMRC did issue default warning letters. These were issued on 29 June 2011 as part of their normal service. This letter would have advised that HMRC had received payments late and in future late payments would be subject to a penalty. It would also advise that the Appellant should contact HMRC should there be difficulties in making payments by the due date. In such a situation a time to pay arrangement would be made. It would have impressed upon the taxpayer the need to make future payments on time and while the first default would not have attracted a penalty, future defaults would have penalties.

25 4. The telephone unit of HMRC would have also contacted the Appellant after the due date for the PAYE payment. Dates were provided that contact was made with the Appellant or their advisers on 23 May 2011, 28 June 2011, 25 July 2011, 24 August 2011, 23 September 2011, 23 December 2011, 23 January 2012, 23 February 2012 and 23 April 2012. Evidence was also provided that 5 legal warning demands were made pursuant to the PAYE Regulations 2003.

30 5. It is quite clear that the Appellant knew or should have known the implications for late payment.

35 6. The Respondents also provided a chart showing payments between 06/04/11 and 05/04/12 which shows that all payments made in that period were late. There is no question that the payments were made late although copies of the cheques indicated that the cheques were prepared within adequate time for reaching HMRC by the due date.

7. The Appellant would also have had the HMRC Employer Bulletin which explains in some detail how returns are made and the due dates. There is a part of that Bulletin which explains clearly under the heading "when should I pay" that payment



must be received by HMRC by the 19<sup>th</sup> of each month. There is no question that the Appellant would have had this information and been aware of the due date for payment.

5 8. The Appellant has been in business for over 30 years. He should have known the implications for paying taxes late. He should also have known the requirement to pay taxes by the due date or been advised by his advisers to do so. He accepts that he did make late payments and in the circumstances therefore there is no reasonable excuse.

10 9. Accordingly, the appeal is dismissed. There is no reasonable excuse for the late payment and the Appellant accepts that the payments were made late.

15 10. The regime may appear to be harsh but it is not an unfair system. The penalty scheme is laid on by statute and provides no discretion (except where “special circumstances” apply which are not suggested here). The penalty rate rises in accordance with the incidence of default and is a fixed percentage. The penalty cannot be excessive where it is correctly assessed and calculated, which is the case here.

20 11. The Tribunal’s jurisdiction in these appeals is quite limited. The Tribunal does not have power to substitute an amount other than the correct amount whether on the basis of fairness or otherwise. Where HMRC have imposed a penalty in the circumstances of the case and the penalty imposed is the correct amount, there is nothing the Tribunal is permitted to do. There is no power given neither by statute nor under the common law to intervene in any other way.

25 12. For all these reasons, the Appellant has not established a reasonable excuse for the late payment, other than allowed under review by HMRC, and there are no special circumstances justifying a mitigation of the penalty. The penalty is not disproportionate and the administration of the penalty was not unfair to the Appellant.

13. The appeal is accordingly dismissed.

30 14. 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.

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**DR KAMEEL KHAN  
TRIBUNAL JUDGE**

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**RELEASE DATE: 30 May 2014**