



TC03290

Appeal number: TC/2011/07647

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**

POWERPLUS ENGINEERING LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE CHRISTOPHER STAKER
MS HELEN MYERSCOUGH ACA**

Sitting in public in Colchester on 27 January 2014

No appearance by or on behalf of the Appellant

Ms K Weare for the Respondents

DECISION

Introduction

1. This is an appeal against a penalty assessment (as amended) of £13,574.35 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 10 months of the year ending 5 April 2011.

2. This appeal was heard in Colchester on 27 January 2014. At the hearing, Ms Weare appeared for HMRC, and produced a documents bundle and a legislation and authorities bundle, as well as a skeleton argument. There was no appearance by or on behalf of the Appellant. The Tribunal requested the clerk to seek to telephone the Appellant on the contact telephone number given in the notice of appeal, to confirm whether it intended to be represented at the hearing. The Tribunal was subsequently informed by the clerk that he had attempted to telephone the Appellant, but that the telephone was not answered.

3. The Tribunal does not criticise the Appellant for not attending. By a letter dated 3 November 2011, HMCTS informed the Appellant that this case had been assigned to the “basic category”. However, by a letter dated 10 November 2011, the Appellant advised HMCTS that it was content for the matter to be determined on the papers, and did not intend to attend the hearing. By a letter dated 24 November 2011, HMCTS then advised the Appellant that the matter will now proceed under the “default paper” category and would be considered on the papers.

4. Nevertheless, the matter was ultimately listed by HMCTS for a hearing, and the Appellant was given notice of the hearing in a letter from HMCTS dated 30 October 2013. In the circumstances, the Tribunal could not proceed with the hearing in the Appellant’s absence, unless satisfied that the requirements of Rule 33 of the Tribunal’s Rules were satisfied.

5. The 30 October 2013 notice of the hearing was addressed to the Appellant’s address as given in the notice of appeal, and the Tribunal was satisfied in the circumstances that the requirement of Rule 33(a) of the Tribunal’s Rules was met. For purposes of Rule 33(b), the Tribunal was also satisfied that it was in the interests of justice to proceed with the hearing, having regard to the matters above, as well as the following. The Appellant had not given any indication that it did not intend to attend the hearing and had not sought any adjournment or postponement. The Appellant therefore might not attend the hearing even if the matter were adjourned or postponed. Ms Weare was present and had prepared for the hearing. Unnecessary adjournments or postponements on the day of hearing are inconsistent with the public interest in judicial efficiency. Rule 38 of the Rules makes provision for a decision of the Tribunal to be set aside in circumstances where the appellant or his representative were not present at the hearing, if it is in the interests of justice to do so (Rule 38(2)(d)). The Tribunal accordingly proceeded with the hearing.

The relevant legislation

6. Paragraph 1 of Schedule 56 states in relevant part as follows:

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- (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.
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- (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
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- Table).
- (5) Sub-paragraph (4) is subject to paragraph 2A.

	<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

7. The table then proceeds to list numerous other categories of taxes.

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8. 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.

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9. 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.

10. Paragraph 6 of Schedule 56 states in relevant part 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-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.

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11. 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—
 - (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.

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12. 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.

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13. 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.
- (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 after the excuse ceased.

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14. 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.

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The issues

15. The document bundle produced by HMRC contained details of when PAYE payments were made by the Appellant for each month during 2010-11. The Appellant has not sought to dispute these details. They indicate that payment was late for every month that year, by periods ranging between 3 and 22 days.

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16. HMRC produced for the hearing a revised penalty calculation (page 9 of the documents bundle). This revised penalty takes account of the decision in *Agar Ltd v Revenue & Customs* [2011] UKFTT 773 (TC), such that the late payment in the 12th month of the year does not count towards the penalty. In accordance with the legislation, the late payment in the first month of the year does not count towards the penalty. The penalty was thus based on HMRC's conclusion that there were 10 defaults during the year, such that the penalty was 4% of the amount of the tax comprised in the total of those 10 defaults.

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17. The Appellant's grounds of appeal are set out in the notice of appeal. In brief, they are as follows. (1) It was wrong for HMRC to allow the penalties to accumulate over a period of time before notifying the Appellant that it was being penalised. (2) The first that the Appellant knew of any change in HMRC practice was when the penalty notice arrived. (3) There was a fatal accident on the Appellant's premises in June 2011 which was adding to the Appellant's worries.

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18. Further grounds are set out in a letter from the Appellant to HMRC dated 29 July 2011, which are in brief as follows. (4) The Appellant continually telephoned HMRC in respect of the fact that it had not received a P30BC payslip booklet, and this was not received until 2 June 2010. (5) The Appellant did not receive any P9 notifications. (6) All PAYE payments were fully paid to HMRC on 6 May 2011. (7) HMRC is discriminated against by HMRC as other businesses are not treated in the same way. (8) HMRC is heavy handed and unfair, and should be targeting those who deliberately fail to pay tax rather than those who endeavour to make payments on time. (9) The economic climate is difficult and the Appellant's bank had reduced its borrowing ceiling to £200,000. (10) The penalty is extortionate.

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The HMRC arguments

19. On behalf of HMRC, Ms Weare in essence submitted as follows in relation to each of the Appellant's grounds of appeal. (1) and (2) HMRC is not required to give warnings, but a specific warning was issued to the Appellant on 28 May 2010 after the first default, and Mr Clayfield of the Appellant was warned of potential penalties in telephone calls from HMRC in September, October, November and December 2010. (3) While such an accident is unfortunate, it occurred after the end of the year to which this appeal relates. (4) A payslip booklet was not necessary for making payments, therefore the absence of a booklet is not a reasonable excuse for paying late; in any event, this argument would only relate to Month 1. (5) If Appellant did not receive any P9 notifications, the Appellant should have continued to operate the previous year's tax codes. (6) The payments were not made within the time prescribed by legislation, and the penalties have been imposed in accordance with the legislation. (7) and (8) The Tribunal has no jurisdiction in respect of this complaint, which should be raised through the HMRC complaints procedure. (9) Insufficient information has been given about the Appellant's bank reducing its borrowing to determine whether this provides a reasonable excuse for late payment. The general economic climate is not a reasonable excuse. (10) The penalty was not disproportionate, and reliance was placed on *HMRC v Total Technology (Engineering) Ltd* [2012] UKUT 418 (TCC) ("*Total Technology*").

The Tribunal's findings

20. The Tribunal finds that:

- (1) the scheme laid down by Schedule 56 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. 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); *Bright Matter Ltd v Revenue & Customs* [2012] UKFTT 572 (TC).

22. HMRC records indicate that HMRC sent the Appellant a letter on 28 May 2010, after the first default. Records of that are at pages 26 and 40 of the hearing bundle.
5 The Tribunal finds on the evidence, on a balance of probabilities, that this letter was sent and received by the Appellant. The first default would have attracted no penalty, if there had been no further defaults for the remainder of the tax year. The Tribunal considers that a reasonable employer, aware generally of its responsibilities to make timely payments of PAYE and NIC amounts due, would have been prompted by this
10 letter to obtain any further necessary information about the penalty regime and available options in the event that the Appellant was unable to pay on time.

23. 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
15 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. 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.

24. 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. This
20 conclusion is supported by *HMRC v Total Technology (Engineering) Ltd* [2012] UKUT 418 (TCC).

25. 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
30 way that it operated in this particular case, was unfair.

26. The Tribunal also finds that its jurisdiction does not extend to determining whether there has been misconduct on the part of HMRC in the way alleged by the Appellant.

27. For the reasons above, the Tribunal rejects the Appellant’s grounds (1), (2), (6),
35 (7), (8) and (10).

28. As to the Appellant’s ground (3), the Tribunal accepts HMRC’s argument that an event in June 2011, although very tragic, cannot provide a reasonable excuse for late payments during a year which ended before the accident occurred.

29. As to the Appellant’s ground (4), the Tribunal finds that while it is true, as
40 HMRC contends, that the Appellant could have made payment without a P30BC payslip booklet, it has not been suggested that the Appellant was not entitled to pay by

5 this method. HMRC have not sought to dispute the Appellant's claim that it continually contacted HMRC in respect of having not received the booklet, and that and this was not received until 2 June 2010. The Tribunal therefore finds that a reasonable excuse has been established for the late payment in Month 1 (the payment due on 5 May 2010). The Tribunal finds that the reasonable excuse does not extend to any of the subsequent months, since the next payment was due on 5 June 2010, and by then the Appellant had the booklet.

10 30. As to the Appellant's ground (5), the Tribunal finds that the Appellant made payments for all of the months during the year in question, but that each payment was between 3 and 22 days late. The absence of P9 notifications did not prevent the Appellant from making each of those payments. The Appellant has not established why the absence of P9 notifications prevented each of those payments being made between 3 and 22 days earlier.

15 31. As to the Appellant's ground (9), paragraph 16(2)(a) of Schedule 56 states that "an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control". The Tribunal finds that a difficult economic climate generally will not amount to a reasonable excuse. As to the Appellant's claim that its bank reduced its borrowing ceiling to £200,000, the Tribunal finds that insufficient details and evidence have been provided by the Appellant to establish that this amounts to a reasonable excuse. The burden of proof is on the Appellant to establish on a balance of probabilities the existence of circumstances amounting to a reasonable excuse, and the Appellant has not discharged this burden.

Conclusion

32. For the reasons above, the Tribunal allows the appeal in part, and finds that:

- 25 a) the Appellant has a reasonable excuse for the late payment of the payment due on 5 May 2010;
- b) there were accordingly only 9 defaults during the year, such that the applicable penalty is 3% of the amount of the tax comprised in the total of those 9 defaults;
- 30 c) the appeal is otherwise dismissed.

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 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**

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RELEASE DATE: 5 February 2014