# TC02148

**Appeal number: TC/2011/06012**

***Penalty – late payment of PAYE and NICs (FA 2009 Sch 56) – Whether HMRC system for administering the penalties unfair – No – Whether penalty disproportionate – No – Whether a reasonable excuse for late payment – No – Whether "special circumstances" justifying a special reduction – No – Appeal dismissed***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**SUNSET TRAVEL LIMITED** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE CHRISTOPHER STAKER**
**SONIA GABLE**

**Sitting in public in London on 18 June 2012**

**Mr S Corner, accountant, for the Appellant**

**Mr G Carroll and Ms E Gardiner for the Respondents**

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DECISION

## Introduction

1. This is an appeal against a penalty assessment (as amended) of £9,181.85 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 11 months of the year ending 5 April 2011.

## 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 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 |

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

4. 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.

5. 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.

6. 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.

...

7. 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.

8. 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.

9. 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,

(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.

10. 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**

11. 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.

12. 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.

13. 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 date for each of the payments, or as to the actual date on which each of the payments was made. It is accepted by the Appellant that each of the payments in respect of which a penalty has been imposed was indeed late. 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. At the hearing, it was acknowledged by Mr Corner on behalf of the Appellant that the Appellant knew about the penalty regime and could have paid on time, and received a warning letter after the first default in May 2010.

14. The Appellant's notice of appeal states as the ground of appeal that "The quantum of the penalty does not comply with the principles of proportionality in breach of European law. HMRC have rendered a penalty without regard to possible mitigation." The grounds of appeal refer to *SKG (London) Ltd v The Commissioners for Revenue & Customs* [2009] UKFTT 341 (TC) ("***SKG***").

15. At the hearing, Mr Corner appeared on behalf of the Appellant. He did not dispute that the Appellant received numbers of reminders throughout the year when payments were late, templates of which are at page C6 of the bundle. However, these letters do not mention penalties. He said that he also did not seek to dispute that the Appellant received the warning letter after the first default, a template of which is at page C7 of the bundle, although the Appellant had no specific recollection of it. However, this letter states only that the Appellant "may" be liable to penalties if he pays late again in future. Mr Corner said that he did not seek to dispute certain HMRC records about telephone conversations with the Appellant. He said that since the penalty notice was issued, the Appellant's payments have been on time.

16. The Appellant's case is that HMRC should have issued a penalty notice after the second late payment, in June 2010. Mr Corner submitted as follows. If HMRC had issued a penalty notice after the late payment of the second month's instalment, the penalty would have been only 1% of the amount in default. The sooner that a penalty notice was issued, the sooner the penalty would have caused the Appellant to comply with the payment regime. HMRC do not dispute that the Appellant began paying on time once he received the penalty notice. The penalty regime is contrary to the common law obligation of fairness. Penalties are not intended to raise revenue but to encourage compliance. Reference was made to *Hok Ltd v Revenue & Customs* [2011] UKFTT 433 (TC) ("***Hok***"); *R (Q & Ors) v Secretary of State for the Home Department* [2003] EWCA Civ 364 ("***Q***"); *Secretary of State for the Home Department v Thakur* [2011] UKUT 151 ("***Thakur***"); *Dent (t/a Tony's Meats) v Revenue & Customs* ("***Dent***") and *Hilltop Syndicate Shoot v Revenue & Customs* [2012] UKFTT 26 (TC) ("***Hilltop***"). The point in time at which it becomes unfair not to issue a penalty notice will depend on the amount involved. At some point it becomes unconscionable not to tell the taxpayer what he is in for, especially as there is no reason, apart from bad administration, for HMRC not to issue a penalty notice. It would have been more than achievable for HMRC to issue a penalty notice within 3 months.

17. On behalf of HMRC the following was submitted. There was no dispute that the penalty was in accordance with the terms of the legislation. The issue was the common law duty of fairness. The penalty for the year increases with the number of defaults during the year, so that it is not possible to determine what the penalty is until after the end of the tax year in question. A warning was sent to the Appellant after the first default in May 2010, warning him that a penalty may be imposed if he was late again. The warning letter quite correctly said that a penalty "may" be imposed, since a late payment would not lead to a penalty if, for instance, there was a time to pay agreement in force, or if the Appellant had a reasonable excuse for the late payment. The penalty is intended to encourage compliance, and is not intended to correspond to the financial loss to HMRC caused by the lateness of the payment. The details of the

penalty regime were publicised to employers before the new regime came into force. HMRC is not required to issue warnings. A warning letter was issued in any event. The Appellant has not advanced any reasonable excuse. The reason why the penalty is so high is that the Appellant has defaulted so many times. Ignorance of the law is no excuse. The cases relied on by the Appellant are distinguishable as they did not involve Schedule 56. The evidence relating to HMRC's attempts to make telephone contact with the Appellant was referred to. The Appellant knew the due dates, but ignored them, and ignored the warning letter and the late payment notices.

18. In reply, Mr Corner argued that there comes a time when the penalty has accumulated to a sum that is so large that it becomes unfair not to give notice to the Appellant of the accrued penalty. HMRC received no response to its calls because the Appellant is a tour operator and not in the office for most of the day. HMRC should have called the Appellant's switchboard rather than his direct dial number. It cannot be known what would have been said in these telephone calls in any event.

## The Tribunal's findings

19. 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.

20. 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).

21. On behalf of the Appellant, Mr Corner accepted that the Appellant was aware of the penalty regime. It was also accepted that the Appellant received the warning letter

sent after the first default in May 2010. The Tribunal is satisfied that there is no basis for suggesting that the Appellant was not given notice of the penalty regime.

22. 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 the May 2010 warning letter to enquire of HMRC the cause of the problem and to obtain information about the penalty regime, if the Appellant was not sufficiently aware of the penalty regime.

23. The Tribunal has considered whether the penalty is disproportionate. In *Dina Foods*, at [40]-[42], the Tribunal 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.
>
> 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. 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", particularly as the Appellant was aware of the penalty regime at the time of each of the defaults. We therefore find that the penalty was not disproportionate.

25. The Appellant argues that there comes a time when the penalty has accumulated to a sum that is so large that it becomes unfair not to give notice to the Appellant of the accrued penalty. The Tribunal considers, however, that if the Appellant was aware of the penalty regime, he would have been aware throughout of the consequences of each of the late payments.

26. The Tribunal has considered the cases relied upon by the Appellant.

27. In *Hok* it was said at [9] that "*a body does not act fairly where it deliberately desists from sending a penalty notice, for four months or more, knowing that the effect will be to impose a minimum penalty of £500 upon somebody whose sin may be no more than oversight or forgetfulness*". This was not a case under Schedule 56, and the Tribunal considers that even if the decision is correct, it is distinguishable. On the evidence, the way that the Schedule 56 penalty regime works is that HMRC sends employers 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. Although such a letter is not a penalty notice, it is a clear warning to the employer about the need to pay on time, and the potential consequences of not paying on time in the future. The Schedule 56 regime overlooks oversight or forgetfulness on the first occasion, and gives a warning to the employer not to be forgetful in the future.

28. *Q* was a case in the very different context of asylum law. The Court of Appeal found that a system operated on behalf of the Secretary of State for the Home Department for providing assistance to asylum seekers was not fair in a number of respects. However, the Appellant does not suggest that there is anything in that case that would provide authority for the proposition that HMRC's system for administering Schedule 56 was unfair.

29. The same can be said of *Thakur*, which involved the fairness of the system for student visas under the Immigration Rules.

30. *Dent* involved the different situation of penalties for late filing of an employer's annual return (P35 and P14).

31. *Hilltop* also involved the different situation of late filing of a P35. In that case, it was expressly said at [32] that it was necessary "to consider whether that delay [by HMRC in sending a penalty notice] has been causative of any part of the penalty accruing which, but for that delay on the part of the respondent, would not have accrued due". Quite apart from the fact that this case did not involve the application of Schedule 56, it is distinguishable. The Appellant in this case says admits that he knew about the penalty regime. He does not deny receiving the warning letter in May

2010. Notices of late payment were then sent in subsequent months. In the circumstances, the Tribunal finds that it cannot accept the argument that the only reason why the Appellant did not pay was that HMRC never sent him a *penalty notice* (as opposed to a warning letter). If the Appellant did not pay despite knowing about the penalty regime, and despite receiving the warning letter and the late payment notices, the Tribunal is not persuaded on the evidence that he would have paid earlier if he had received a penalty notice at an earlier time. The fact that he may have paid on time after he did receive the penalty notice in this case does not persuade the Tribunal that the absence of such a penalty notice was a genuine reason why he had not paid until then.

32. In the circumstances, 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, or that the administration of the penalty regime was unfair. It follows that the appeal must be dismissed.

**Conclusion**

33. For the reasons above, the Tribunal dismisses the appeal.

34. 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.

**CHRISTOPHER STAKER**
**TRIBUNAL JUDGE**

**RELEASE DATE: 24 July 2012**