TC02500

Appeal number: TC/2012/5095

PAYE- penalties under Schedule 56 Finance Act 2009 – operation of the scheme of penalties – whether lack of specific warning a reasonable excuse – no – whether any special circumstances existed to justify a reduction in penalty amount – no – whether appellant's human rights infringed – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ILKLEY HEALTH CARE LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE DAVID DEMACK
ANN CHRISTIAN

Sitting in public at Bradford on 8 January 2013

Mr S E Botros, of Botros & Co, chartered accountants, for the Appellant

Ms J Bostock of HM Revenue and Customs, for the Respondents

DECISION

1. The appellant company, Ilkley Health Care Ltd ("the Appellant"), appeals against a penalty of £6,100 imposed under Schedule 56 of the Finance Act 2009 ("the 2009 Act") as a result of its failure timeously to make payment of PAYE and NICs in every month of the tax year 2010/2011. The amounts due, their due dates, actual payment dates, number of days late and the penalty amounts charged, as agreed between the parties as being correct, are set out in the following table:

Month	Amount (£)	Due date	Date received by HMRC	Days late	Penalty at 4%
1	15531.14	19/05/2010	25/05/2010	6	0
2	16497.79	19/06/2010	25/06/2010	6	660
3	15125.76	19/07/2010	23/07/2010	4	605
4	15401.92	19/08/2010	26/08/2010	7	616
5	16266.13	19/09/2010	30/09/2010	11	651
6	15457.97	19/10/2010	28/10/2010	9	618
7	15166.28	19/11/2010	25/11/2010	6	607
8	15249.46	19/12/2010	21/12/2010	2	610
9	14896.49	19/01/2011	27/01/2011	8	596
10	15258.82	19/02/2011	26/02/2011	7	610
11	13190.45	19/03/2011	25/03/2011	6	528
	184226.06				610

2. The Appellant appealed on the basis that "the company encountered financial hardship due to problems relating to the collection of fees from residents". That basis was extended in its appeal before us, as will shortly appear.

3. For the benefit of the Appellant we should explain that from 6 April 2010 the Commissioners introduced a new penalty regime for the late payment of monthly PAYE and National Insurance Contributions ("NICs") by employers. Previously, it

was possible for employers to delay payments to the Commissioners of such sums for a period without incurring any material costs. Under Schedule 56 of the 2009 Act that possibility was removed. Schedule 56 imposes penalties for the late payment of PAYE. The penalties also cover associated Class 1 NICs. Such penalties are calculated on a sliding scale. The more late payments in a tax year, the larger the percentage penalty applied to the aggregate of the late payments. The first default in any one year is disregarded altogether. The remaining defaults trigger a penalty of 1%, 2%, 3% or 4% depending on their number. A 4% penalty is payable if there are ten or more defaults in the tax year.

4. Before us, the Appellant was represented by its accountant, Mr S E Botros, and the Commissioners by Ms J Bostock, one of their officers. We were provided with two bundles of copy documents (one including authorities), which were added to at the hearing. We did not take formal evidence, but invited the Appellant's two directors to address us informally.

5. The facts are not in dispute and may shortly be stated in the following way. The Appellant operates a nursing home in Ilkley. Its two directors are Mr Michael J Flynn and Mr M Kehoe. The latter takes no active part in the running of the nursing home, and lives in Manchester. He visits Ireland frequently. Consequently, he pays only occasional visits to the home. The daily operation is carried out by Mr Flynn, who suffers from erosive seronegative arthropathy, a form of arthritis. Mr Flynn's arthritis is usually kept under control by drugs prescribed by his GP, but occasionally erupts with the result that he is unable to carry out his duties. They include the submission of its PAYE and NICs to the Commissioners.

6. The Appellant claims that it was dependent on local authorities for the majority of its income and, since the authorities were slow in making payment of sums due, it was unable timeously to make payment of the tax and NICs due from it. No evidence was adduced to confirm this but, even had it been, since the Commissioners disclosed that the Appellant had regularly made late payments of tax and NICs from 2002/03 onwards – a claim that was undisputed - we should have expected evidence to be adduced showing what steps it had taken to manage the situation. No such evidence was presented to us and, in its absence, we are not prepared to accept that any delays in payment were such as to prevent the Appellant from itself making payment on time. In any event the delays in payment were relatively minor, seemingly indicating an intention not merely to take credit where it could but also to extend the credit period available to it to suit its convenience rather than an inability to pay due to a shortage of funds. In our judgment, the Appellant's conduct could not amount to a reasonable excuse for late payment.

7. We were told that the two directors had to be present when issuing cheques to the Commissioners. Among the papers put before us were copies of a number of cheques drawn in favour of HM Revenue and Customs, all of which were signed by a single director. From that fact, we conclude that the Appellant's instructions to its bankers were to honour cheques signed by one of the two directors. There was thus no good reason why the two had to be present when the Appellant issued cheques for PAYE and NICs. It would surely have been adequate for Mr Flynn to telephone his co-

director when PAYE and NIC payments were due, and for the two of them to agree that payment should be made. That could have been done by telephone or email. It follows that we find that the Appellant's claimed practice, even if it were a fact resulting in the late payment of PAYE and NICs, could not amount to a reasonable excuse for its late payments.

8. Mr Flynn also claimed that his medical condition was such in itself as to provide the Appellant with a reasonable excuse. Had that claim been made in respect of individual defaults and been supported by other evidence, it might have been possible for us to exclude at least some of them in calculating the penalty. But it was not made. It was quite evident from what we were told that Mr Flynn's condition was of long standing, so that the Appellant should have had in place arrangements to cover any unexpected arthritic attacks he suffered. Such arrangements should have extended to the timeous payment of the Appellant's tax liabilities. Again, we are satisfied that the Appellant could not look to Mr Flynn's medical condition as affording it a reasonable excuse for its defaults.

9. The directors claimed that the Appellant had been given no warning that its practice of making late payment of PAYE and NICs was likely to result in its being assessed to penalties. (We earlier mentioned the Appellant's history of late payments, and might add that evidence of payment throughout 2009/2010 was adduced by the Commissioners showing every payment in that year, except one, as having been made late). The Commissioners records showed that the Appellant was issued with a warning letter on 28 May 2010. Mr Flynn was telephoned on 26 October 2010 and 24 March 2011. In the earlier call he refused to enter into discussion with an officer of the Commissioners as to why the Appellant was making late payments. And in relation to what we believe to have been the later call, Mr Flynn admitted treating the caller somewhat rudely. Mr Flynn invited us to accept an apology for his behaviour on that day. Telephone messages about delays in payment were left by the Commissioners with the Appellant requesting return calls from a director on 29 September 2010, 24 November 2010 and 25 January 2011, but no return calls were made. Further, in September 2009, April 2010 and August 2010 the Commissioners sent to all employers Employer Bulletins, leaflets containing articles entitled "Avoid late payment penalties – Pay on time and in full". Employers were also provided with a CD-rom containing information similar to that in the bulletins. Even were we to accept that the Appellant was given no specific warning that the Appellant was likely to incur penalties should its conduct continue, which incidentally we decline to do, we observe that the Employer Bulletins gave quite adequate notice of the new penalty regime and, in any event, despite the fact that the legislation contains no provision for a formal warning we find that Schedule 56 excludes the first default from the penalty regime.

10. Mr Botros further claimed that the Commissioners were in breach of a common law duty of fairness, relying on the following statement from [18] of the First-tier Tribunal's decision in *HMD Response International v HMRC* [2011]UKFTT 472:

"..the appellant is entitled to rely upon the common law duty of a public body to act fairly not just in its decision-making process but also in administering its statutory powers."

The First-tier Tribunal in *Agar Ltd v HMRC* [2011] UKFTT 773 (TC) "expressed no view" on that statement, but observed that, even if it were correct, "we see nothing in the present case which would justify setting aside the penalty on the basis of them". The tribunal continued, "The Appellant was very well aware of its obligations and of the fact that it was defaulting. What it really complains of is that it did not realise the full implications of its actions, in terms of the new penalties they would attract. Effectively Mr Priddey [the appellant's accountant and representative] was arguing that the Appellant should be excused from the penalty by reason of its ignorance of the law. It is a long established principle of English law that this argument is doomed to fail".

Those observations are equally applicable in the instant case, and we adopt them.

11. Finally, Mr Botros submitted that the penalty imposed was disproportionate to the errors of the Appellant. As the tribunal in *Dina Foods Ltd v HMRC* [2011] UKFTT 709 (TC) observed at [41] and [42]:

> "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".

Again, we adopt those observations.

12. To summarise, the Appellant accepts that it did default in making payment of the PAYE and NICs set out in the table at [1] above. We hold that the penalty was correctly calculated at the rate of 4% by reference to the amounts of its defaults and as we are satisfied that the Appellant has no reasonable excuse for its defaults. It follows that we dismiss the appeal.

13. 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.

DAVID DEMACK
TRIBUNAL JUDGE

RELEASE DATE: 30 January 2013