



**TC03666**

**Appeal number: TC/2013/02487**

*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**

**BANHAM VEHICLE SERVICES LTD**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE CHRISTOPHER STAKER  
MR DAVID E WILLIAMS CTA**

**Sitting in public in Norwich on 18 February 2014**

**Mr R Stubbington of the Appellant**

**Mr D Wilson for the Respondents**

## DECISION

### Introduction

1. This is an appeal against a penalty assessment (as amended) of £2,261.77 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.

### 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.

	<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

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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:

- 5 (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—
  - 10 (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—
  - 15 (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—
  - 20 (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”).
- 25 (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—
  - 30 (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—
  - 35 (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:

- 5 (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.
- 10 (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
- 15 (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.

20 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**

25 11. HMRC produced for the hearing a revised penalty calculation (page 2 of the documents bundle). This revised penalty takes account of the decision in *Agar Ltd v Revenue & Customs* [2011] UKFTT 773 (TC). In accordance with the legislation, the late payment in the first month of the year does not count towards the penalty.

30 12. 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, 10 and 16 of Schedule 56, there is no dispute as to the calculation of the penalties.

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40 13. The principal arguments in the Appellant's notice of appeal are as follows. The Appellant was paying in accordance with an arrangement made at Norwich County Court. At that hearing, District Judge Sparrow directed both parties to reach an acceptable payment regime. At that hearing, the Appellant and HMRC agreed that the Appellant could pay by the 19<sup>th</sup> of the month following the month in which payment fell due. The effect of the agreement was to give the Appellant an additional month to pay each payment. The Appellant subsequently adhered to what was agreed

despite difficult trading conditions, and always paid in full. Despite having until the 19<sup>th</sup> of the following month to pay, the Appellant typically paid by the first of the following month.

14. Attached to the Appellant's grounds of appeal was a letter from the Appellant to HMRC dated 7 November 2011 setting out what the Appellant considered to be the situation. In the hearing bundle were further letters from the Appellant to HMRC setting out this understanding, dated 16 June 2011, 4 July 2011, 18 August 2011, and 31 May 2012 (hearing bundle, pages 3, 6, 9-10 and 19). The 16 June 2011 letter (and subsequent letters) stated that the agreement giving the Appellant an additional month to pay had been reached with a Mr Clarkson of HMRC. The 16 June 2011 letter stated that "Surely if this arrangement was to be changed some consultation would clearly be needed".

15. A letter from HMRC to the Appellant dated 13 July 2011 (hearing bundle, pages 7-8) stated as follows:

15                   After reading through all the records of the court cases we have had  
with you, I can find only one note on 12<sup>th</sup> Oct 2005 which refers to a  
Time to Pay Arrangement. It states you were to write in with your  
proposals together with a cheque for month 5 of that year. Our reply  
was that the arrangement was for month 4 only and all future payments  
20                   must be made on time.

16. In response to that letter, the Appellant's letter of 18 August 2011 stated that:

25                   As for your interpretation that the arrangement only existed for 1  
month ie month 4 in 2005 is total nonsense and if that had been the  
case then I am sure we would have heard from the court or your office  
long before now.

17. However, the Appellant's letter of 7 November 2011 indicated that the Appellant did not have a letter from Norwich County Court or HMRC setting out the claimed agreement, and stated that "HMRC must have the records", and that "no attempt seems to have been made to contact or obtain the notes from Mr Clarkson". The Appellant's letter of 31 May 2012 adds that "It would appear that until your Mr Clarkson is found and his records have been checked we have an impasse".

18. In the bundle, there are also records of certain telephone conversations between Mr Stubbington and Mrs Stubbington of the Appellant and HMRC (hearing bundle, pages 22 and 40-52, with a summary at pages 38-39).

19. At the hearing, Mr Stubbington presented the case for the Appellant, accompanied by Mrs Stubbington. Mr Stubbington gave evidence that the Appellant had entered into the agreement as claimed on the occasion of a hearing before District Judge Sparrow of the County Court, apparently in about 2005. Mr Stubbington said that he had wanted Mr Clarkson of HMRC to attend the hearing of the present appeal but that HMRC had not arranged this, and that it would not be possible to get to the root of the problem without Mr Clarkson. Mr Stubbington insisted that there had been an

agreement between the Appellant and HMRC as claimed, and that the Appellant had adhered to the terms of this agreement.

20. The case for HMRC at the hearing was, in effect, that the Appellant had not established that such an agreement had been entered into between the Appellant and HMRC, that HMRC had no record of such an agreement, and that it was implausible that HMRC would enter into an agreement under which the Appellant would be given an additional month to make every payment on a permanent basis.

21. At the end of the hearing, the Tribunal issued a direction as follows:

10 HMRC shall make enquiries as to whether Mr Clarkson has any personal recollection of an agreement entered into with the Appellant in 2005 pursuant to which the Appellant could make PAYE payments up to one month later than the due date, and if so, the details of that recollection. HMRC shall within 21 days of the hearing on 18 February 2014 file with the Tribunal and serve on the Appellant details of the results of that enquiry. Thereafter the Tribunal will proceed to determine the appeal without a further hearing unless either party requests a further hearing.

22. Pursuant to that direction, HMRC advised the Appellant and the Tribunal in a letter dated 3 March 2014 as follows:

20 Following the Directions issued by the Tribunal Service on 28<sup>th</sup> February 2014, please find below a statement from Mr Stuart Clarkson (HMRC), relating to your recent appeal hearing. The statement was taken from an e-mail sent by Mr Clarkson to the Debt Management Unit on 29<sup>th</sup> August 2013:

25 'I have looked at the notes you suggested and my first observation would be that attempting to remember what may or may not have been said 8 years ago is rather difficult.

30 However I do remember the Taxpayer in question and the many long discussions I have had with him over the years on the subject of non payment – mainly on distraint calls.

35 I may have said to him (although I cannot say for certain) that if he were to pay within 3 weeks of the due date then he would not hear from us, as an incentive to bring his payments up to date, as he had previously been several months in arrears. However the rules in those days were different and the penalty regime in place at the time would not have penalised him for paying in this manner. Given the amount of time and effort that myself and other colleagues had spent with this Taxpayer over a number of years I believed that getting him to pay within 3 weeks of the due date would be a success.

40 I don't believe that any formal notification was issued and indeed the IDMS notes suggest that we asked him to write in **(Page 44 of the document bundle – 23/9/2010)** –  
45 presumably no such letter was forthcoming? If I did make

such a comment then I would not have intended it, or imagined that he would take it to be, a carte blanche to pay his tax late for the next decade or so.

5 Overall my summing up would be the elapsed time makes any definitive response redundant. Although I would say no formal agreement was made and I feel the Taxpayer is clutching at straws somewhat, given the amount of literature concerning payment and penalties that has been issued to him in the intervening 8 years'

10 Mr Clarkson's statement above reiterates that the penalties for late payment of PAYE were not in existence in 2005. Taxpayers were informed that distraint action and County Court Proceedings were not usually started until the payment had been outstanding for more than three to four weeks. Therefore if a payment could be made within three  
15 to four weeks, HMRC would have no need to start distraint action. As Mr Clarkson mentions, this was not a carte blanche to pay tax late indefinitely.

20 In his last paragraph Mr Clarkson also reiterates HMRC's view that even if you held a belief that an agreement was in place that belief was without foundation, given the amount of literature and correspondence sent to you regarding the new penalties.

23. In an e-mail to the Tribunal dated 27 March 2014, the Appellant confirmed that he did not require a further hearing in this appeal. The e-mail went on to state as follows:

25 Strangely this statement [of Mr Clarkson] was made in August 2013 yet was unheard of by HMRC representative at the tribunal. Although we agree in general terms with Mr Clarkson's statement there are some points which are incorrect, firstly I did not have 'many long discussions' with him in fact it was my secretary who spoke to him and  
30 that was mainly after receiving one of a number of distraint letters which him [*sic*] subsequently dealt with on our behalf leaving us to carry on paying as per the arrangement. Secondly at no time have we ever been 'several months' in arrears their system would not allow this to happen and as their records will show our payments were made in  
35 full and within the agreed time scale i.e. up to 21 days after the 19<sup>th</sup> of the month, in fact as our bank records can prove our payment was usually made within 14 days of the 19<sup>th</sup> deadline. Our final point is in relation to the fact that no formal letters were received either from the court or HMRC, their suggestion in correspondence (page 44  
40 23/09/2010) that we should write to them is quite extraordinary, we could not possibly set down terms of payment that were agreed with them at the court, the onus is upon the claimant and or the court to set out any terms or orders that had been made at the hearing and for us to accept this agreement or face further action. Regardless of the lack of  
45 any official paperwork we accepted the decisions from the hearing and paid accordingly, if the rules about payments or penalties changed as we are lead to believe then again the onus of responsibility firmly lies with HMRC to contact those affected by the changes, lastly I would



add that as our companies finances improved. We have paid in full and within the allotted time scale.

### **The Tribunal's findings**

24. The Tribunal finds that:

- 5           (1) the scheme laid down by Schedule 56 of the Finance Act 2009 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  
10           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  
15           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   25. 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).

25   26. On the basis of the evidence before it, the Tribunal is satisfied on a balance of probabilities that some time around 2005, Mr Clarkson said to Mr Stubbington that if he were to pay within 3 weeks of the due date then he would not hear from HMRC.

27. However, any such statement was clearly made in the context of the law and the circumstances as they existed at the time that the statement was made. Furthermore,  
30   the Tribunal is not persuaded on the evidence that HMRC ever entered into a formal agreement with the Appellant that he would be granted an extension of several weeks for every payment on an indefinite basis. The Tribunal finds on a balance of probability that any such statement made by Mr Clarkson simply reflected the practical reality that under the law and practice as it existed at the time, there were no  
35   penalties for late payment, and distraint action and County Court Proceedings were not usually started until the payment had been outstanding for more than three to four weeks. The Tribunal finds that any such statement did not amount to a time to pay agreement, and certainly not an indefinite ongoing time to pay agreement for purposes of paragraph 10 Schedule 56.

28. The question then is whether the Appellant nonetheless reasonably believed that there was an ongoing agreement with HMRC pursuant to which the Appellant had an additional month to make each payment. If so, the question is whether such a belief could amount to a reasonable excuse or special circumstances for purposes of paragraphs 9 or 16 of Schedule 56.

29. The Tribunal finds that the Appellant could not have reasonably believed that anything said by Mr Clarkson in about 2005 meant that it was acceptable for the Appellant to continue to make payments several weeks late following the coming into force of Schedule 56. It is also clear that the Appellant could not have held a reasonable belief that Mr Clarkson or any other individual HMRC officer had the authority to grant an indefinite extension of a statutory due date. The Appellant's letter of 18 August 2011 complains that if the law had changed, he should have been given notice of this by HMRC, and that "it is no good saying that certain information is available on internet sites as I and my only member of staff responsible for payment have neither the computer knowledge or the available time to go looking for such sites". That is in essence a plea of ignorance of the law. However, the Tribunal does not consider that ignorance of the law is a reasonable excuse or that it amounts to special circumstances.

30. In any event, HMRC records indicate that HMRC sent the Appellant a letter on 28 May 2011, after the first default (pages 36 and 55 of the hearing bundle). The Tribunal finds 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 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.

31. The Tribunal is also satisfied on the evidence that the Appellant company was sent employer bulletins and other information about the penalty regime before it came into force.

32. The Tribunal is furthermore satisfied on the evidence before it, on a balance of probabilities, that HMRC did advise the Appellant in a telephone conversation on 23 September 2010 (pages 38 and 44 of the hearing bundle).

33. 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 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.

34. For the reasons above, 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.

5 35. 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  
conclusion is supported by *HMRC v Total Technology (Engineering) Ltd* [2012]  
10 UKUT 418 (TCC).

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

15 **Conclusion**

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

38. 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  
20 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 CHRISTOPHER STAKER  
TRIBUNAL JUDGE**

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**RELEASE DATE: 30 May 2014**