[2012] UKFTT 577 (TC)

# TC02254

**Appeal number: TC/2012/05102**

***PAYE – penalty for late payment – sch 56 FA 2009 – reasonable excuse – payment history – change of staff – appeal dismissed***

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

**CHARGECREST LTD** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE RICHARD J MANUELL**
**MRS C DE ALBUQUERQUE**

**Sitting in public at 45 Bedford Square London WC1A 3DN on 17 August 2012**

**Mr C Mills, Director, and Mrs G Halemas, Accountant, for the Appellant**

**Mrs A McHugh and Mr P Rouse, Presenting Officers, for the Respondents**

## DECISION

1. The Appellant appealed against the penalty charged under schedule 56 of the Finance Act 2009, in the sum of £14698.86, for the late payment of PAYE and NIC for the tax year 2010-2011 on 7 separate occasions. The penalty had been reassessed by HMRC following the Tribunal's decision in *Agar* [2011] UKFTT 773 (TC). It was accepted by the Appellant and not in dispute that (a) the payments were late and (b) the calculation of the revised penalty at the rate of 3% was accurate.

2. Copies of the relevant current legislation and Tribunal decisions were provided by HMRC's representatives to the Tribunal and to the Appellant's representatives. The key provision for the present appeal is paragraph 9, schedule 56, Finance Act 2009:

> "(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."

3. Mrs Ginny Halemas ("Mrs Halemas") gave evidence on the Appellant's behalf. The Appellant's business is the supply of temporary staff. Mrs Halemas said that she had been appointed as the Appellant's accountant in July 2010. The previous accountant, long in post, had suffered a bereavement the previous November, and had worked intermittently until his departure. The company had relied on agency office staff between then and her appointment. After joining the Appellant, Mrs Halemas had immediately sought to establish a good relationship with HMRC as there were ongoing cash flow issues. Some years before the Appellant had begun using invoice discounters to improve its cash flow, as often the Appellant had to pay its staff before it was paid by its clients. Mrs Halemas said that Mr Graham Matthews of HMRC had been helpful in working out a better system for the company. The late payment penalty had come as a surprise and the Appellant's view was that the penalty imposed was too high and unfair.

4. The panel asked Mrs Halemas what information about the new penalty system had been received by the Appellant. She thought that there had been little apart from

a booklet, but she had not been in post when the new system had commenced. The accountant who had left in July 2010 might have seen more, but she understood that things had been *ad hoc* since his bereavement.

5. Mr Cliff Mills ("Mr Mills") said that he had left accounting matters to the accounts staff. There was nothing he wished to add but confirmed that what Mrs Halemas had said was accurate. Neither witness produced any documents. There was no cross-examination of either witness.

6. Mrs McHugh took the panel through HMRC's bundle of documents, which included copies of correspondence, internal telephone attendance notes and HMRC notices, together with the materials by which the new penalty system had been publicised. In summary, the documents showed a history of late payments by the Appellant going back to 2005. There was a memorandum of a meeting held between the Appellant and HMRC on 26 June 2012, followed by a letter setting out the action which had been agreed with the Appellant to address its problems. An example of the warning letter dated 28 May 2010 as sent to the Appellant was identified, together with the guidance booklets sent to all employers.

7. Mrs McHugh relied on her skeleton argument and submitted that no reasonable excuse had been shown by the Appellant. There was no unexpected event. There had not been a request for deferred payment.

8. Mrs Halemas submitted that the company had been told to disregard warnings from HMRC in the past. In particular there was nothing to record the regular contact between the company and HMRC. There had been no refusal to pay. It was not accepted that a warning letter had been received. The interest charge was unclear.

9. The panel reserved its determination, which now follows. The panel is satisfied that Mrs Halemas and Mr Mills gave truthful evidence of the matters of which they had direct knowledge. The Appellant's complaint was in the panel's view as much about the amount of the penalty as about the penalty in principle. As the late payments and the accuracy of the revised penalty calculation were admitted, it was for the Appellant to prove that it had a reasonable excuse which covered the lateness in question. In the panel's view the Appellant failed to do so. While there had been a degree of operational difficulty caused by the previous accountant's bereavement, the pattern shown by the unchallenged documents produced by HMRC had been one of longstanding late payments by the Appellant. Thus nothing had been changed by any event following the previous company accountant's bereavement. As was stated by the witnesses, the late payments were due to the cash flow pressures on the Appellant's business, where it was obliged to pay staff before the company was paid itself. But that was the nature of the business of the supply of temporary agency staff and was entirely foreseeable.

10. Until the introduction of the new regime, this modest juggling of payments by the Appellant to suit its cash flow was permissible, at least in the sense that it did not give rise to any penalty. But an entirely new penalty regime was introduced by parliament in the Finance Act 2009, as the Tribunal explained in *Dina Foods Limited*

[2011] UKFTT 709 (TC). This ended HMRC's previous flexibility over late payments. The panel is satisfied that there was an extensive campaign of advance publicity and that the Appellant was sufficiently alerted. The panel is satisfied that the warning letter dated 28 May 2010 produced by HMRC was sent and received. Mrs Halemas was not then in post at the Appellant and Mr Mills left such matters to the accounts staff. Thus neither was in a position to comment. That is not to imply that HMRC were under any statutory duty to seek to warn the Appellant of change and potential penalties, but simply to acknowledge that good practice was followed by HMRC. Importantly, the Tribunal has ruled in *Rodney Warren & Co* [2012] UKFTT 57 (TC) and in *Dina Foods Limited* (above), that any failure by HMRC to give warning of the penalty regime cannot provide a reasonable excuse in law, because the obligation is to make payment by the due date.

11. The panel accepts that there was no dishonesty by the Appellant, rather it was a situation where the Appellant was caught out (like many others) by a significant change in the law. The penalty scheme as laid down by the statute provides no discretion (except where "special circumstances" apply, which was 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, as here, it was agreed that the penalty as revised was correctly assessed and calculated. The panel follows *Dina Foods Limited* (above), at [40] to [42], and *Agar* (above) at [46] and finds that the penalty was not disproportionate.

12. The panel finds that the Appellant has shown no reasonable excuse for late payment. The appeal is dismissed.

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.

**RICHARD J MANUELL**
**TRIBUNAL JUDGE**

**RELEASE DATE: 6 September 2012**