



**TC03208**

**Appeal number: TC/2013/05028**

*Income Tax – late payment penalty Finance Act 2009 Schedule 56 – Self-Assessment - reasonable excuse – no - special reduction – no – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**JOHN GUNN**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE FIONAGH GREEN**

The Tribunal determined the appeal on 18 October 2013 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 29 July 2013 (with enclosures), HMRC’s Statement of Case submitted on 3 September 2013 (with enclosures) and the Appellant’s Reply dated 26 September 2013.

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## DECISION

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1. This is an appeal against a penalty in the sum of £126.00 for the late payment of tax for the tax year 2011-2012.

10 2. The appeal is determined without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 the Tribunal having decided that there was sufficient evidence and that it was fair and just to proceed.

### Facts

15 3. John Gunn's (Mr Gunn) electronic return for the tax year 2011-2012 was received on 25 January 2013. Mr Gunn was required to file a self-assessment tax return as his income exceeded £100,000.00 and he met self-assessment criteria. The tax return had been issued to him on 12 July 2012.

20 4. Mr Gunn had paid his tax liability by Pay as You Earn for many years but an underpayment arose as he received full tax free allowances in 2011-2012 and when income exceeds £100,000.00 tax free allowances are reduced.

25 5. The Notice of Coding issued to Mr Gunn on 22 February 2012 was calculated using an estimated income of £81,626.00 based on his 2010-2011 income. The Notice of Coding clearly states that it should be checked carefully and HMRC advised if it is incorrect

6. The calculation and payment deadline was available to Mr Gunn from 25 January 2013 when he submitted his return online.

7. The tax was due to be paid on or before 31 January 2013.

30 8. At the penalty date of 2 March 2013 £2,535.60 of the tax liability remained unpaid.

9. HMRC issued a penalty assessment on or around 19 March 2013 in the amount of £126 being 5% of the tax unpaid at the penalty date.

35 10. Mr Gunn paid his tax liability by Pay as You Earn and did not expect to pay further significant sums of tax at the end of the tax year and did not have funds available to pay the tax liability.

11. A statement of account was sent to Mr Gunn on 5 March 2013 informing him of his liability. There were no earlier reminders. Mr Gunn phoned HMRC but could not make contact and wrote to HMRC on 18 March 2013 asking for additional time to

pay. The letter to Debt Management and Banking Services requesting time to pay was received on 20 March 2012 after the 30 day period allowed for late payment.

12. A Time to Pay Agreement was entered into on 24 April 2013.

5 Legislation

13. There was no dispute between the parties regarding the liability to income tax pursuant to the Taxes Management Act 1970. It may be helpful to set out the relevant provisions relating to payment of income tax, reasonable excuse and special reduction at this point.

10 . SCHEDULE 56 Finance Act 2009 provides:

1(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.

Paragraphs 3 to 8 set out—

(a) the circumstances in which a penalty is payable, and

15 (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

20 (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).

<i>Tax to which payment relates</i>	<i>Amount of tax payable</i>	<i>Date after which penalty is incurred</i>
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**PRINCIPAL AMOUNTS**

<b>1</b>	<b>Income tax or capital gains tax</b>	<b>Amount payable under section 59B(3) or (4) of TMA 1970</b>	<b>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</b>
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### **Special reduction**

**9 (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.**

### **Reasonable excuse**

**16 (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.**

### **Issue**

14. Late payment was not in dispute and the only issues for the Tribunal are whether –

(i) HMRC should have sent an earlier statement and reminder

5 (ii) there was reasonable excuse for late payment

(iii) there should be special reduction

(iv) whether the penalty was unfair or disproportionate

## Submissions

5 15. Mr Gunn –

(i) did not receive notice of a tax shortfall until 5 March 2013, after the 30 day period had elapsed

(ii) was on Pay As You Earn at the time and did not expect a significant shortfall of tax at year end

10 (iii) it was a surprise and he did not have sufficient funds to pay

(iv) as soon as he became aware of the sum owed he tried to contact HMRC to arrange payment terms but could not get through by telephone over a number of weeks and then wrote to HMRC on 18 March 2013 requesting time to pay

15 16. HMRC –

(i) Mr Gunn's income for the tax year 2011-2012 exceeded £100,000.00 and so he was required to submit a tax return for that year; the self-assessment criteria was met

(ii) the 2011-2012 return was issued to Mr Gunn on 12 July 2012

20 (iii) the underpayment arose as Mr Gunn received full tax free allowances in 2011-2012 but when his income exceeded £100,000.00 the tax free allowances reduced

(iv) the Notice of Coding issued to Mr Gunn on 22 February 2012 was calculated using an estimated income of £81,626.00; the Notice of Coding stated clearly that it should be checked carefully and that HMRC should be advised if incorrect

25 (v) the 2011-2012 return was submitted online on 25 January 2013 and that a tax calculation was created online showing the liability and the due date

(vi) a statement of account was issued to Mr Gunn on 5 March 2013 informing Mr Gunn of the outstanding balance and that the amount was now due and payable as the due date had passed and providing contact numbers for HMRC

(vii) there is no reasonable excuse for the late payment

30 (viii) there are no special circumstances

## Discussion

17. There was no dispute between the parties that Mr Gunn was required to submit  
5 a tax return for the year 2011-2012. Mr Gunn was required to submit a self -  
assessment return as his income exceeded £100,000.00 and he met the self -  
assessment criteria.

18. There was no dispute that the electronic return for the year 2011-2012 was  
10 received on time on 25 January 2013, that tax was due to be paid on or before 31  
January 2013 and that at the penalty date of 2 March 2013 £2,535.60 of the tax  
liability remained unpaid.

19. The Tribunal considered the first issue. Mr Gunn's electronic return was  
received on 25 January 2013 and was processed on the same day with the liability  
being automatically calculated. The online information shows the liability for that  
15 year and the due date. Information about self-assessment, completion of returns,  
payment dates and penalties are available online through HMRC's website, telephone  
helpline, public counters and public notices. HMRC did not send a statement of  
account until 5 March 2013. The statement of account informed Mr Gunn of the  
outstanding balance, that the amount was due and the deadline had passed however  
20 the information regarding Mr Gunn's liability was available to him from 25 January  
2013. The tax was due to be paid on or before 31 January 2013 and at the penalty  
date of 2 March 2013 £2,535.60 of the liability remained unpaid. The front of the tax  
return clearly warned that 'if you pay late you will be charged interest and a late  
payment penalty.' The penalty was imposed in accordance with the legislation. The  
25 penalty date in accordance with Paragraph 1 (4) Schedule 56 Finance Act 2009 is the  
date on which the penalty is first payable for failing to pay the amount, that is, the day  
after 30 days from the date specified in section 59B Taxes Management Act 1970.

20. The Tribunal then considered the second issue. Although Mr Gunn had reasons  
for the late payment the Tribunal decided that the reasons do not amount to reasonable  
30 excuse. An insufficiency of funds is not a reasonable excuse unless attributable to  
events outside of Mr Gunn's control. The Tribunal looked behind the reasons for the  
insufficiency but decided that there was no unexpected or unusual event that was  
either unforeseeable or beyond Mr Gunn's control and a prudent taxpayer would have  
checked the online calculation showing the liability. Mr Gunn, in his appeal  
35 correspondence, stated that the tax due was a surprise and left him with insufficient  
funds to pay however he should have been aware of the level of his income and his  
likely tax liability. Mr Gunn or his agent could have taken advice from the HMRC  
website, telephone helpline and public information. Mr Gunn should have taken steps  
to ensure that should an underpayment occur that there was sufficient time to arrange  
40 payment or to reach agreement with HMRC. Mr Gunn should have checked the  
Notice of Coding issued to him on 22 February 2012 and been aware that it was  
calculated using an estimated income of £81,626.00. Mr Gunn's income then

increased. Mr Gunn's income exceeded £100,000.00 and he met the self-assessment criteria which reduced the tax-free allowances. Mr Gunn did not contact HMRC until he received the statement of account. The Tribunal accepts that Mr Gunn did try to contact HMRC by telephone on 5 March 2013 but this was after the penalty date. The Tribunal also accepts that Mr Gunn tried to contact HMRC again by telephone and that a letter was written to HMRC on 18 March 2013 although this was not received by them. A Time to Pay agreement was not reached until 24 April 2013. No payment was made towards the liability until 2 April 2013. There is no reasonable excuse for the late payment.

21. The Tribunal then considered the third issue. The law allows a reduction to the penalty below the statutory minimum if it is right because there are special circumstances. For circumstances to be special they must be 'exceptional, abnormal, or unusual' (*Crabtree v Hinchcliffe*) (*Inspector of Taxes*) [1971] 3 All ER 967 or 'something out of the ordinary run of events' *Clarks of Hove v Bakers' Union Limited* [1978] 1 W.L.R.1207 Geoffrey Lane Lord Justice "What, then is meant by "special circumstances?...In other words, to be special the event must be something out of the ordinary, something uncommon; and that is the meaning of the words "special" in the context of this Act." Although Mr Gunn did not realise that he would have a considerable tax liability to pay and had not apparently considered that, as his income exceeded £100,000.00, the tax free allowances would be reduced, the Tribunal decided that he could have checked his liability online or through an agent when the information was calculated on 25 January 2013 and that he should have acted as a prudent taxpayer and taken steps to ensure that he had funds to pay or to arrange a Time to Pay Agreement before the due payment date and the Tribunal decided that there are no special circumstances.

22. As to the issue of proportionality and fairness the Tribunal would be acting in excess of its jurisdiction if it discharged the penalty on the ground that its imposition was unfair. HMRC did not send out a statement of account until 5 March 2013. There is no evidence that in sending it out on 5 March 2013 that this was a deliberate act to ensure that a penalty could be sought. The fact is that the information was available to Mr Gunn on 25 January 2013. The penalty notice itself was issued on or around 19 March 2013 and following the Upper Tribunal decision of *The Commissioners for Her Majesty's Revenue and Customs v Hok Limited* [2012]UKUT 363 (TCC) it is clear that the actions of HMRC were not unfair and the penalty is due.

#### Decision

23. The late payment penalty is in accordance with the legislation. There is no reasonable excuse for Mr Gunn's failure to pay or to arrange a payment plan on time by the due date and there are no special circumstances. The appeal is dismissed. The £126 late payment penalty is confirmed

24. 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.

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**FIONAGH GREEN  
TRIBUNAL JUDGE**

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**RELEASE DATE: 7 January 2014**