



**Appeal number: TC/2012/06177**

***Penalties – late payment of PAYE – Schedule 56 Finance Act 2009 – Reasonable excuse – Appeal allowed***

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**CHADDERTON TOTAL CARE UNIT LIMITED      Appellant**

**- and -**

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

**TRIBUNAL: JUDGE JOHN N. DENT  
MEMBER ALBAN HOLDEN**

**Sitting in public at Manchester on 18 October 2012**

**Ms Yang, Counsel for the Appellant**

**Mr Jones, Officer of HM Revenue and Customs, for the Respondents**

## DECISION

1. This appeal concerns a decision made by HMRC that a penalty in the sum of £13,575.12 should be imposed on the Appellant under Schedule 56 to the Finance Act 2009. The penalty was assessed in respect of late payments during the tax year 2010-2011 of income tax under the "Pay As You Earn" provisions ("PAYE") and Class 1 National Insurance Contributions ("NIC"). The Appellant's submission was that it was not liable to a penalty as it had reasonable excuse for failing to make the payments on time. Alternatively, the amount of the penalty should be reduced to nil because of special circumstances.

### Evidence

2. The Appellant made an application for the witness statement of Alan Miller, a director of the Appellant Company, dated 16 October 2012 to be admitted as evidence. Mr Miller was unable to attend through illness. The Respondents made no objection to the application, and agreed to the facts stated in the statement of Mr Miller being admitted as evidence. The Tribunal agreed to the application. There was no oral evidence.

3. The documentary evidence of what happened included:

- Correspondence between HMRC and the Appellant and its Accountants from September 2011
- Notes of telephone conversations between HMRC and representatives of the Appellant from May 2010
- Penalty notices and PAYE late payment penalty calculations
- HMRC Legislation, employer bulletins and case law bundle, and submission/speaking brief
- Notice of appeal, Appellant's skeleton argument, witness statement of Mr Miller, copy of First Tier Tax Tribunal cases, extract from Budget 2010 and extract from *National Insurance Contributions: an introduction*.

### The facts

4. We found the following facts:

(1) The Appellant Company operates a registered care home providing nursing care to some 150 vulnerable patients.

(2) During the tax year 2010-2011 the Appellant paid PAYE and NIC to the Respondents, after the due dates. Only 8 of the late payments count for the purpose of the penalty. One is disregarded as the first failure, and one falls into the following year and is not included in the 8 failures. In month

6 no penalty has been charged as both payments were allocated to month 7, and has been treated as not adversely affecting the Appellant. The month 11 payment was allocated to month 12 as a payment promise was not kept, but as month 12 is excluded HMRC have not corrected the position as it is to the Appellant's advantage. In accordance with Paragraph 6 of Schedule 56 Finance Act 2009 8 occasions were assessed and a penalty charged at 3% in the sum of £13,575.12.

(3) The Appellant was unable to make payments on time as a result of cash-flow difficulties generated by (1) persistent late payments by those of its own clients that were either local authorities or primary care trusts, together accounting for some 80% of its client base; and (2) its inability to obtain further credit from its bank. Despite the Appellant's efforts to enforce payment, the local authorities and primary care trusts persisted in delaying payment, and moreover refused to pay interest on the amounts paid late.

(4) During the tax year in question, the Appellant was placed by its bank in the "Specialised Lending Unit" as a result of the level of borrowing required by the Appellant. The Appellant had a bank loan and an overdraft facility of £300,000. One of the consequences of the Appellant being in the Specialised Lending Unit was that the bank kept a very close eye on the Appellant's finances and cash flows. Were the Appellant to have exceeded its overdraft limit without authority, there was a likelihood that the bank would have started enforcement (including insolvency proceedings) against the company. The Appellant, because of being in the "Specialised Lending Unit" would have found it impossible to move to another bank.

(5) The Appellant could not secure more credit from its bank. The credit facilities came up for renewal in March 2010, and, as a result of the bank's concerns, monthly meetings were held between the company and the bank, and it was not until August 2012 that the facilities were eventually renewed.

(6) In March 2011, as the outstanding debts had reached unsustainable levels, Mr Miller had to sell personal assets in order to lend money to the Appellant.

(7) Having exhausted its credit facilities the Appellant was completely dependent on receipts from local authorities and primary care trusts in order to fund all its tax and NIC liabilities.

(8) HMRC issued a penalty warning letter to the Appellant on 28 May 2010. Mr Miller had contacted HMRC on 24 June 2010 asking for time to pay, which was refused by HMRC. He again contacted HMRC on 02 July 2010, requesting an arrangement to pay because of late payments by the "government", meaning the local authorities and the primary care trusts. The request was again refused. He contacted HMRC again on 04 October 2010, giving the same explanation for late payment. There were similar calls on 25 January 2011 and on 27 January 2011. On 27 January the Company's accountant making promises to pay month 7 by 31 January

2011, month 8 by 15 February 2011 and months 9 and 10 by the first week in March 2011. The payments were made, but not by the promised dates.

(9) The Appellant was aware of the liability to penalties, and continued to make late payments despite that awareness.

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### The law

5. Schedule 56 of Finance Act 2009 provides for the computation and assessment of the penalty. There was no dispute between the parties as to the computation and assessment.

10 6. Paragraph 9 of Schedule 56 provides for HMRC to reduce the amount of a penalty if they think it is right because of "special circumstances". "Special circumstances" does not include ability to pay.

7. Paragraph 16 of Schedule 56 provides that there is no liability to a penalty if the taxpayer had a "reasonable excuse" for a failure to make a payment as follows:

15 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.*

20 (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*  
25 (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.*

### 30 The issues.

8. The issue before the Tribunal was whether the Appellant had a reasonable excuse for the purposes of sub-paragraph 16(1), for the failure to make the payments on time; or, if the tribunal decided that the Appellant is *prima facie* liable to a penalty whether there were special circumstances, for the purposes of Paragraph 9, justifying a  
35 reduction of the penalty to nil.

### Respondent's Submissions

9. HMRC's argument was that the Appellant was aware of the penalty regime. This is not disputed by the Appellant. They also argue that the Appellant is expected to take steps to manage its finances so that it can make payments of PAYE on time.  
40 They say that having trouble getting paid for services supplied is not something unusual or uncommon, it is simply a normal part of running a business. HMRC

submitted that HMRC had not entered into a time to pay arrangement and that there was no reasonable excuse for the late payments. They suggested that all the Appellant had encountered was its normal trading conditions and that the Appellant could have paid on time but chose not to do so.

5 10. HMRC submitted that the Courts have considered special circumstances and concluded that it must be something exceptional, unusual or uncommon – something out of the ordinary. In the Penalty Notice and at the conclusion of the internal review, HMRC asserted that “reasonable excuse” requires some “unforeseeable”, “exceptional”, “unexpected” or “unusual” event, and that lack of funds is not a  
10 reasonable excuse.

11. HMRC drew the Tribunal’s attention to the comments of Judge Berner in *Dina Foods v HMRC* [2011] UKFTT 709 (TC). The following passages were cited:

15 “37. Having considered all the evidence and material before us we can find no special circumstances that would justify a reduced penalty. This is a company that has habitually paid its PAYE late. We do not consider that the lack of awareness of Dina Foods Ltd of the penalty regime is capable of constituting a special circumstance. In any event, having considered the evidence of the information provided by HMRC concerning the introduction of the PAYE and NICs penalties, we are of the view that no  
20 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.

25 38. In this context we have a number of observations to make concerning the scheme of Schedule 56 as a whole, as it applies to PAYE and NICs payments. The penalty regime is based on the number of defaults over a complete tax year. There is no separate penalty for each individual default; the penalty can only be assessed once the aggregate of the late paid tax comprised in the total of the defaults for a particular tax year has been ascertained. A taxpayer who continues to pay late, so increasing both  
30 the amount of tax (and NICs) on which the penalty may be levied and the rate of the penalty, may well complain that his behaviour (and thus the amount of his liability) would have been different had a penalty been levied in respect of a default early in the tax year or at least a warning issued. But on the scheme of penalties that has been laid down, the total  
35 would not then have been capable of being ascertained, so the penalty could not at that earlier time have been assessed.

40 39. We do not therefore consider that 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 of itself capable of amounting either to a reasonable excuse or special circumstances.”

## Appellant's Submissions

12. The issue of proportionality was not raised by the Appellant.

13. The Appellant submitted that it was not able to make the payments on time because:

- 5 (1) It was wholly dependent on payments from its Public Clients (local authorities and primary care trusts) in order to discharge its PAYE/NIC liabilities;
- (2) The Public Clients did not pay the Appellant in time, notwithstanding significant efforts on the Appellant's part to chase up payments; and
- 10 (3) No credit facility was available to the Appellant which could have been used to make payments on time.

14. As soon as it received payments from its Public clients it immediately used those funds to discharge its PAYE/NIC liabilities

15 15. Tribunals had held on a number of previous occasions, on facts similar to the present ones, that a delay in payment by the taxpayer's own clients, or the taxpayer being unable to obtain finance from a bank in order to assist in making payment on time is a circumstance outside the taxpayer's control and accordingly would be a reasonable excuse if it was the cause of the taxpayer's paying the tax/NIC late. *Rodney Warren & Co v HMRC [2012] UKFTT 57 (TC)* and *HCM Electrical Limited v HMRC [2011] UKFTT 852(TC)* were cited.

20 16. In *Algarve Granite Limited v HMRC [2012] UKFTT 463 (TC)* at [34], Judge Brennan applied to the consideration of a case under Schedule 56 the following passage from the judgment of Lord Donaldson MR in *Customs and Excise Commissioners v Steptoe [1992] STC 757* at 770:

25 "If the exercise of reasonable foresight and due diligence and a proper regard for the fact that the tax would become due on a particular date would not have avoided the insufficiency of funds which led to the taxpayer's default, then the taxpayer might well have reasonable excuse for non-payment; but that excuse would be exhausted by the date on which such foresight, diligence and regard would have

30 overcome the insufficiency of funds."

17. The Appellant argued that in this case it was clear that, even with "*the exercise of reasonable foresight and due diligence and a proper regard for the fact that the tax would become due on a particular date*", the Appellant could not have avoided the insufficiency of funds which led to the payments being made late, and that the

35 Appellant was (and is) reliant on the Public clients for its business, it had made every effort to secure payments by those clients, and during the tax year 2010-2011 it was unable to access any other credit facility to fund the payments.

18. The Appellant submitted that in the circumstances, there was an insufficiency of funds available to the Appellant, which was attributable to events outside its control,

and that insufficiency of funds directly accounted for the payments having being made late. Accordingly, the Appellant did have a reasonable excuse for making the payments late, and it followed that no liability to the penalty can arise.

5 19. The Appellant argued that the approach of HMRC to the question of "reasonable excuse" was simply wrong, and that there is no stipulation in the legislation that a "reasonable excuse" can only exist where there is some "unforeseeable", "exceptional", "unexpected" or "unusual" event. Moreover, lack of funds that is attributable to events outside the taxpayer's control (as is the case in this appeal) does amount to reasonable excuse.

10 20. The Appellant submitted that the decision in *Dina Foods v HMRC* was of no assistance to HMRC or to the Tribunal in this appeal. The taxpayer company in *Dina Foods* centred its arguments on:

15 (1) The lack of warning from HMRC as to the new penalty regime, and whether that amounted to a reasonable excuse for its failure to make payments of PAYE and NIC on time; and

(2) The amount of the penalty imposed being excessive

and the Tribunal gave its decision accordingly on those arguments only.

21. The decision in *Dina Foods* did not consider any of the issues that are raised in this appeal. Accordingly, that decision is of no relevance in the instant case.

20 22. The Appellant went on to advance an argument concerning whether there were Special Circumstances under Paragraph 9 of Schedule 56. In the light of the Tribunal's decision recited below, there was no need for the Tribunal to consider Special Circumstances, and so the submission is not repeated here.

### Decision

25 23. In the light of the finding of facts the Tribunal concluded that no penalty should have been imposed on the Appellant. The Tribunal found that all the late payments were the direct result of an insufficiency of funds attributable to events outside the Appellant's control. In consequence, the Appellant had a reasonable excuse for failing to make the payments on time, and accordingly no liability to the penalty should arise.

30 24. The Tribunal agreed with the Appellant's submission that

(1) It was wholly dependent on payments from its Public Clients (local authorities and primary care trusts) in order to discharge its PAYE/NIC liabilities;

35 (2) The Public Clients did not pay the Appellant in time, notwithstanding significant efforts on the Appellant's part to chase up payments; and

(3) No credit facility was available to the Appellant which could have been used to make payments on time.

25. The Appellant had, in the finding of the Tribunal, reached the limit of its facilities with its bankers, and was subject to control by the "Specialised Lending Unit" of the bank. It was not possible to exceed the terms of its overdraft, and the Appellant would not have been able to move to a different bank, with increased facilities.

5 26. We agreed with the Appellant's submission that even with *"the exercise of reasonable foresight and due diligence and a proper regard for the fact that the tax would become due on a particular date"*, the Appellant could not have avoided the insufficiency of funds, which led to the payments being made late.

10 27. We found that the Appellant was aware of the penalty regime, and that notwithstanding the likelihood that penalties would be imposed, the Appellant continued to make late payments of PAYE/NIC, because it had no realistic alternative. It pressed the public authorities for payment and it warned HMRC that its payments would be late. It was unable to make a formal time to pay arrangement, because HMRC was naturally unwilling to do so. It could have made staff redundant,  
15 but that would have resulted in a breach of its obligations to the vulnerable people who were relying upon the Appellant for nursing care.

28. We therefore concluded that the appeal should be allowed, and that no liability to a penalty arose.

20 29. We did not need to go on to consider whether there were special circumstances justifying a reduction in the amount of the penalty under Paragraph 9 of Schedule 56.

30. 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  
25 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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JOHN N. DENT

TRIBUNAL JUDGE

RELEASE DATE: 14/11/12

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