



TC01608

Appeal number TC/2011/06359

*PAYE – late payment of. Penalty/surcharge – reasonable excuse.
Insufficiency of funds – whether cause of insufficiency amounts to a
reasonable excuse.*

FIRST-TIER TRIBUNAL

TAX

DUDMAN GROUP LIMITED

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE AND CUSTOMS**

Respondents

**TRIBUNAL: GERAINT JONES Q. C. (JUDGE)
KAMAL HOSSAINI ESQ (MEMBER)**

Sitting in public at 45 Bedford Square, London WC1 on 09 November 2011.

Mr Mike Herdman of Grant Thornton UK LLP for the Appellant

Mrs Gardner, officer of H. M. Revenue and Customs, for the Respondents

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DECISION

1. Dudman Group Ltd accepts that throughout the period the 01 May 2010 – 30 April 2011 it was late paying over to HMRC tax and national insurance contributions due under the PAYE system. During that 12 month period it made 9/12 payments late. The lateness ranged from a maximum of twenty six days to a de minimis one day.

2. Consequent upon that lateness the respondent has demanded a penalty of £29,841.89 in respect of the fiscal year ended 5 April 2011, being 3% of the annual tax and national insurance. The Penalty Notice is dated 15 June 2011 whereafter the appellant requested an internal review. The result of that review, dated 19 July 2011, was to uphold the penalty.

3. The appellant has appealed to this Tribunal. The appellant accepts that the nine payments tabulated at page C1 in the hearing bundle, were each late by the number of days specified alongside the various periods. The appellant's case is not that the statutory penalty regime does not apply but, rather, that it has a reasonable excuse for its failure to pay timeously.

4. For the purpose of this appeal we received evidence by way of a statement dated 7 November 2011 from Mr Dudman. There was no request to cross examine him and the accuracy of the information provided by him was not called into question by the respondent's representative.

5. The law provides that the penalty can be avoided if the taxpayer establishes that it had a "reasonable excuse" for the late payments. The law provides that impecuniosity is not, of itself, to be considered a reasonable excuse. If an appellant is to establish a "reasonable excuse" it has to establish that it has an excuse and that, when viewed objectively, that excuse can properly be characterised as reasonable; no more, no less. In the leading case of *Customs and Excise Commissioners v Steptoe (1992) STC 757* it was held that although insufficiency of funds can never of itself constitute a reasonable excuse, the cause of that insufficiency, being the underlying cause of the taxpayer's default, might amount to a reasonable excuse. The facts in *Steptoe* were that the taxpayer, in a relatively small way of business, who did the vast bulk of his work for the London Borough of Redbridge, was financially embarrassed by reason of that council's failure to pay its bills timeously. The taxpayer sought to excuse his late payment of VAT on the basis that he had cash flow difficulties caused by his main customer's policy of paying late.

6. When the case reached the Court of Appeal Lord Donaldson expressed the test to be applied, as follows : *"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 default, then the taxpayer may well have a reasonable excuse for non-payment, but that excuse will be exhausted by the date on which such foresight, diligence and regard would have overcome the insufficiency of funds."* [page 770].

7. The appellant, by its Mr Dudman, has given evidence that during the period February 2010 - April 2011 the appellant's trading and cash flow position was adversely affected by there being nine specific business failures, leading to liquidation or administration, on the part of its debtors. During that period those bad debts were
5 £259,315.42p. The evidence is that the bad debt figure for just over one year earlier, being October 2008 – October 2009 was £51,171.03p. The point was also made that those customers who were paying, were extending their credit period and persistently paying late. We accept that evidence.

8. When arguing the case for the respondent, Mrs Gardner argued that the appellant
10 is a recidivist and, thus, the excuse presently being put forward should not lead to the penalty being set aside. That argument can be put in one of two ways. The first would be to argue that the excuse being put forward is not genuine. That was not the argument actually advanced. The second way of putting the argument would be to say that because an appellant is a recidivist, the excuse is not reasonable. The flaw in the
15 second argument is that the taxpayer's history has no significant bearing upon whether or not the excuse presently relied upon, when viewed objectively, does or does not amount to a reasonable excuse. When we assess whether the excuse is a reasonable excuse we must leave out of account any increment of prejudice that, no doubt, it was hoped would operate against the appellant by reason of having
20 transgressed in the past. If we proceeded in any other way we would be failing to apply the law in a proper manner.

9. We now turn to the evidence, in more detail. The evidence given by Mr Dudman speaks to the bad debts, summarised above. It is striking that one of the bad debts in September 2010, was in the sum of £185,714.

25 10. The evidence also speaks to problems that the appellant was having with its bankers, AIB plc. The evidence is that that bank insisted upon converting a £4 million overdraft facility into a Confidential Invoice Discounting arrangement which Mr Dudman says reduced the company's working capital by around 30% , whilst, at the same time, increasing its bank charges by around £32,000 per annum. He also
30 says that throughout the relevant period the bank had hiked the appellant's payable interest rate from base rate plus 1.5% to LIBOR +3%. He also says that rates charged on all loans increased by 1.5%, thus adding substantially to the cost of funding. That evidence is entirely credible.

11. We are satisfied that even whilst exercising reasonable foresight and due
35 diligence in and about its affairs, with particular reference to tax that would become payable, the appellant did not and could not avoid the insufficiency of funds which led to these comparatively brief periods of default. It is our judgement that the appellant has put forward an excuse, and that our main role is to consider whether, when that excuse is viewed objectively, it can properly be characterised as reasonable.

40 12. There are few who can be oblivious to the pressures upon small and medium-size businesses caused by the recent turbulence in the financial markets and the near recession like conditions that have prevailed in the economy at large in the United Kingdom and perhaps Europe generally, over the last two or three years. We judge the

excuse put forward by the appellant against that background, but primarily on the basis of the facts set out by Mr Dudman in his evidence; which we accept. Upon approaching the matter in that way we have no hesitation in concluding that the appellant has established that it had a reasonable excuse for its comparatively slight tardiness in making the due payments.

13. We also have to be satisfied that the appellant used reasonable diligence to pay the tax. We are left in no doubt that the appellant was doing all that it could to collect in its debts and to renegotiate its facilities with its bankers, on commercially acceptable terms, as swiftly as it could manage. To a large extent the pace at which those arrangements were determined lay substantially with the bank. We are equally in no doubt that the appellant did pay the tax as soon as it reasonably could, as evidenced by the comparatively brief periods of delay. Indeed, Mrs Gardner did not suggest otherwise.

14. Accordingly we conclude that the appellant has established a reasonable excuse in respect of its several defaults and thus the appeal succeeds.

15. 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.

Decision

Appeal allowed.

The penalty is set aside, in full.

TRIBUNAL JUDGE
RELEASE DATE: 30 NOVEMBER 2011

Amended pursuant to rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on 9 January 2012.