



**TC02349**

**Appeal number: TC/2012/07148**

*TYPE OF TAX – –PAYE –appeal against the penalty imposed for the late payment of PAYE- Schedule 56 Finance Act 2009- directors’ daughter diagnosed with terminal brain tumour in March 2010 and died in October – reasonable excuse for months 1-7 – unreliability of payments by clients not a reasonable excuse – penalty confirmed for other months*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**FROST GROUP LIMITED**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE SANDY RADFORD  
MRS ELIZABETH BRIDGE**

**Sitting in public at Bedford Square, London on 17 September 2012**

**Mr J Frost, director of the Appellant, for the Appellant**

**Mrs E Gardiner, Officer of HMRC, for the Respondents**

## DECISION

1. This is an appeal against the penalty of £2,682.98 for the late payment of PAYE in eight of the twelve months in the tax year 2010/11.

### The legislation

2. Penalties for the late payment of monthly PAYE amounts were first introduced for the tax year 2010/11. The legislation is contained in Schedule 56 to the Finance Act 2009 (“Schedule 56”). Schedule 56 covers penalties for non- and late payment of many taxes: paragraph 1(1) (which applies to all taxes) states that a penalty is payable where the taxpayer fails to pay the tax due on or before the due date.

3. Paragraph 6 (which relates only to employer taxes such as PAYE) states that the penalty due in such a case is based on the number of defaults in the tax year, though the first default is ignored. The amount of the penalty varies as provided by subparagraphs (4) to (7):

(4) If P makes 1, 2 or 3 defaults during the tax year, the amount of the penalty is 1% of the amount of 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 tax comprised in the total amount 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 tax comprised in the total amount 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 tax comprised in those defaults.

In this and other paragraphs of Schedule 56 “P” means a person liable to make payments.

4. Under paragraph 11 of Schedule 56 HMRC is given no discretion over levying a penalty:

11(1) Where P is liable to a penalty under any paragraph of this Schedule HMRC must –

- (a) assess the penalty,
  - (b) notify P, and
  - (c) state in the notice the period in respect of which the penalty is assessed.
- (3) An assessment of a penalty under any paragraph of this Schedule—
- (a) is to be treated for procedural purposes in the same way as an assessment to tax (except in respect of a matter expressly provided for by this Schedule),
  - (b) may be enforced as if it were an assessment to tax, and

(c) may be combined with an assessment to tax.

5. Paragraphs 13 to 15 of Schedule 56 deal with appeals. Paragraph 13(1) allows an appeal against the HMRC decision that a penalty is payable and paragraph 13(2) allows for an appeal against the amount of the penalty. Paragraph 15 provides the Tribunal's powers in relation to an appeal which is brought before it:

(1) On an appeal under paragraph 13(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 13(2) that is notified to the tribunal, the tribunal may-

10 (a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had the power to make.

(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 9-

15 (a) to the same extent as HMRC...[...],or

(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 9 was flawed.

6. Paragraph 9 (referred to in paragraph 15) states:

20 (1) If HMRC think it right because of special circumstances, they may reduce the 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.

25 (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.

7. Paragraph 16 contains a defence of reasonable excuse, but an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control. Nor is it such an excuse where P relies on another person to do anything unless P took reasonable care to avoid the failure; and 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 has ceased.

## **Background and facts**

8. Mr Frost gave evidence that he is an insolvency practitioner who started on his own in 2006. In 2008 and 2009 he appointed employees. It had been impossible to find any other partners and he and his wife held the shares of the appellant.

5 9. He explained that 2010 had been a very difficult year. His daughter was diagnosed with a brain tumour in 2006 and given the all clear in January 2010. However, in March 2010 the doctors informed them that she was terminal and she died in October 2010.

10 10. Both he and his wife spent much time taking their daughter to hospital appointments and his wife stayed at home with their daughter from the time of the terminal diagnosis.

11. He confirmed that he had spoken to HMRC but inevitably he spoke to them on his mobile phone from the hospital car park where he had no papers or knowledge of his reference number.

15 12. He stated that it was not possible to invoice for fees in respect of the insolvency until the cases were complete and as a result of the credit crunch everything was taking more time.

13. In May 2010 he appointed an accountant to come in once a week to help with the appellant's financial affairs due to the absence of his wife.

## 20 **HMRC's submissions**

14. Mr Gardiner was concerned that HMRC had not been informed of the pressures put on Mr and Mrs Frost by the illness of their daughter.

15. She submitted that insufficiency of funds was not a reasonable excuse for the late payment of the PAYE.

25 16. She submitted that there was no one-off unique cash flow problem so the shortage of funds could be dismissed as a normal business hazard.

17. She submitted that the penalty regime had been properly publicised and the appellant should be well aware of it.

## **Appellant's submissions**

30 18. Mr Frost submitted that the appellant's finances were dependent on when the insolvency cases settled.

35 19. He submitted that before his daughter was sick his wife used to work four days a week but once his daughter became ill she had to take more and more time off work. Even after his daughter's condition improved his wife was never able to come back to work.

20. Mr Frost submitted that once his daughter was diagnosed terminal, his wife stayed at home with her full time.

### **Findings**

5 21. The Tribunal found that the terminal illness of the directors and shareholders' daughter was a reasonable excuse for the initial late payments of PAYE for the relevant tax year.

22. We found that it would have been impossible for the directors to keep up with the administration whilst dealing with their personal tragedy.

### **Decision**

10 23. The penalty in respect of months 1-7 are hereby cancelled. As month 8 will no longer count as a default being the first default of the relevant tax year, we confirm the penalty in respect of months 9 and 10.

15 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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**SANDY RADFORD  
TRIBUNAL JUDGE**

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**RELEASE DATE: 31 October 2012**