



TC02565

Appeal number: TC/2012/06868

*INCOME TAX - GROSS PAYMENT STATUS – Compliance test –
Cancellation- appellant hit by a series of financial blows followed by the
death of his daughter- whether reasonable excuse for the late payment of
PAYE and tax – yes –appeal allowed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

TERRY DANIEL

Appellant

- and -

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

**TRIBUNAL: JUDGE SANDY RADFORD
RICHARD CORKE**

Sitting in public at Exeter on 1 November 2012

The Appellant in person

Mr D Bradley, officer of HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal against HMRC's decision to withdraw gross payment status within the Construction Industry Scheme ("CIS") from the appellant.

Background and facts

2. The appellant is a self employed plastering contractor who holds gross payment status within the CIS.

3. Contractors who hold this status are required to submit payments and returns on time and this is regularly reviewed by HMRC.

4. HMRC wrote to the appellant on 1 December 2011 informing him that a review was about to take place. The letter pointed out that in the past twelve months numerous late payments had been made.

5. PAYE was paid late in February 2011, March 2011, May 2011, July 2011, August 2011 and September 2011. The appellant's self assessment tax due on 31 January 2011 was not paid which resulted in two surcharges becoming due in May and September 2011.

6. The letter gave the appellant an opportunity to explain why the payments were late so that HMRC could decide whether a reasonable excuse existed for the failure.

7. In reply the appellant explained that his young daughter had died suddenly during the year in question causing himself and his wife enormous grief and stress. Additionally one of the companies he worked for had gone insolvent owing him money and he had lost a lot of money from non payment of works he had done.

8. In evidence the appellant explained in more detail that he had done a large extension for a friend, Mr Penrose, and together with Mr Penrose he had done a large conversion creating flats which were currently on the market. However Mr Penrose failed to pay for the extension resulting in a loss of some £80,000 for the appellant. The appellant produced the invoice addressed to his friend Mr Penrose in amount of £127,873.95 which Mr Penrose had failed to pay.

9. This failure of his friend to pay what he owed triggered an overdraft of £100,000. Previously the appellant had an overdraft of a fixed £100,000 and a floating £20,000. However at Christmas 2010 the bank subsequently dramatically reduced this to £50,000 converted the balance of £50,000 into a loan and took away the £20,000 float. The appellant had relied on this £20,000 to pay the PAYE and his self assessment tax of £7,658.33.

10. In January 2011 the appellant told his accountant that he was struggling and the accountant suggested that he should go into an IVA but with the subsequent death of his daughter he did not do so.

11. He understood from his accountant that because of his losses in the previous year he would not have any tax to pay.

12. Mrs Daniel confirmed that she had phoned the HMRC business support to inform them that payments would be late.

5 13. HMRC accepted that the appellant had a reasonable excuse for the late PAYE payments following the death of his daughter. However HMRC did not accept that the appellant had an excuse for the unpaid self assessment tax and subsequent surcharges.

14. The appellant has now entered an IVA and the payment of these amounts is included.

10 15. The appellant has now won a big contract which should finally put him on an even keel again.

16. HMRC accepted that throughout this matter the appellant had received confusing mixed messages from them. His wife had phoned the business support service several times for help but had not really been assisted.

15 17. Mr Bradley accepted that there were a number of sales invoices and bank statements submitted to HMRC at the last minute which he had not had a chance to analyse in depth.

18. The appellant submitted a letter from the supervisor of his IVA which stated that if the appellant lost his gross payment status he might no longer be able to meet
20 his ongoing obligations under the terms of his IVA.

Appellant's submissions

19. The appellant and his wife provided considerable detail concerning the failed business venture with their friend submitting that his failure to reimburse them had started a chain of events from which it was almost impossible to recover. The matter
25 had gone to mediation but their lawyer had failed to turn up at the last minute and as they were unrepresented the resolution was most unsatisfactory.

20. The appellant submitted that this was followed in quick succession by the bank reducing the overdraft and then the death of their daughter.

21. The appellant submitted that throughout he had received mixed messages from
30 HMRC. His wife had spoken to their business support unit several times to explain why payments would be late and they were under the impression that this had been accepted.

22. The bank had let them down at the last minute by withdrawing the £20,000 float leaving him with no means of meeting the payments but they had informed HMRC of
35 the problem.

23. He submitted that HMRC could not argue with the fact that he had done the best he could as a competent businessman.

HMRC's submissions

5 24. HMRC submitted that an insufficiency of funds was not a reasonable excuse for the failures to pay the tax and surcharges.

25. HMRC submitted that any non payments suffered by the appellant were within the normal hazards of trade and did not constitute a reasonable excuse.

10 26. HMRC submitted that it was not possible for it to consider the consequences of the withdrawal of the gross payment status and that the Tribunal did not have the discretion to do so either. Mr Bradley stated that this was supported by the case of *Barnes v Hilton Main Construction* [2005] EWCH 1355(CH).

Findings

27. The Tribunal had tremendous sympathy for the appellant. We found the appellant and his wife to be sincere and honest.

15 28. We accepted that the failed business venture with the person the appellant and his wife regarded as their friend had started a chain of unforeseen and unfortunate events.

29. We found that before this the appellant had run an efficient business paying all his bills on time.

20 30. However the friend refused to pay his share of the costs of the business venture as he had promised leaving the appellant with the whole bill which could not be recouped until planning permission was obtained and the flats were sold.

25 31. We found that although the appellant justifiably was confident that the legal proceedings in respect of the dispute with Mr Penrose would be found in his favour, as a result of his solicitor not attending without notice, he was unsuccessful.

32. We found that the bank unexpectedly withdrawing a substantial part of the appellant's overdraft, converting £50,000 into a loan which had to be paid back at £800 a month and removing the floating overdraft of £20,000 made it impossible for him to meet his immediate obligations.

30 33. We accepted that the appellant's wife had telephoned the business support unit of HMRC several times for help which was not forthcoming and that the death of the appellant's daughter was the last straw.

35 34. For all the above reasons we found therefore that the appellant had a reasonable excuse for the late payments including his self assessment tax and the surcharges arising for which he has made arrangements to pay through his IVA.

35. We examined all the papers submitted to us including those submitted late by the appellant. We found that the appellant had not made HMRC fully aware of the chain of unfortunate events arising so that before this hearing HMRC was not fully cognisant with all the facts.

5 36. The Tribunal is required to consider what a reasonable competent business man would have done in a similar situation. A reasonable competent business man is taken to have exercised reasonable foresight but we found that the chain of events causing the appellant to default was not something which he could ever have foreseen. He had planned to meet his obligations with his floating overdraft when the bank removed it
10 without warning.

37. We found that in all the circumstances he had acted as a reasonable competent business man and in our decision we were assisted by the decisions of Sir Stephen Oliver QC in the case of *Stephen Mutch v HMRC* [2009] UKFTT 288 (TC) and Anne Redston in the case of *Keith Joseph-Lester v HMRC* [2011] UKFTT 114 (TC).

15 **Decision**

38. The appeal is allowed.

39. 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
20 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: 21 February 2013