



**TC02590**

**Appeal number: TC/2012/10357**

*PAYE – late payment – whether a reasonable excuse due to worker  
absenteeism – yes – Appeal allowed.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**ID MACHINERY LTD**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE DR K KHAN**

**Sitting in public at Bedfordshire on 25 January 2013**

**Sarah Farr, Commercial Manager and John Brasier, Sales Director for the  
Appellant**

**Gloria Orimoloye, Higher Officer for HM Revenue and Customs, for the  
Respondents**

## DECISION

### Introduction

- 5 1. This is an appeal against a Pay As You Earn (“PAYE”) late penalty notice for 2011/2012 for the amount of £5,864.88.
2. The appeal is against a decision to charge a penalty for the late payment of PAYE.

### Background

- 10 3. The Appellant Company is a privately owned. It specialises in the sale of new and used equipment for the paper converting industry. An important part of the business is the purchase, stocking and rebuilding of used machinery in the fabrication of paper and cardboard products for the packaging industry.
4. The company is appealing against a decision of 18 October 2012.

### 15 Penalty

5. Penalties were charged for failure to pay PAYE on time. There were nine defaults in the period between 5 March 2011 and 5 March 2012. The total amount of these defaults was £134,718.48. The default penalty is 3% of that amount. The penalty was charged pursuant to paragraph 6 of Schedule 56 Finance Act 2009.
- 20 6. The payments were between 15 and 37 days late.
7. The Company was in financial difficulties. The Revenue was involved in monitoring the Company’s payments. This involved an HMRC officer (Terry Collier) visiting the company on a monthly basis to obtain payments by cheque. He suggested that the Company should approach the Business Payment Support Services (“BPSS”) of HMRC for advice and help. They were approached and advised on 13 June 2011 that they were unable to help.
- 25 8. In September 2012 the Appellant was visited by HMRC Officer Elizabeth Barratt who suggested that the Appellant’s could use quantification as way of clearing their outstanding tax liability since their liability was continually being carried forward and consequently resulted in a series of late payments. Quantification allows the correct amount of tax due to be calculated and paid. This assisted the Appellant.
- 30 9. The Appellant was advised to switch to paying their PAYE electronically.

### HMRC Review Letter 18 October 2012 (decision appealed)

10. The following points were made;

11. HMRC considered that the company had a customer bad debt and suffered a loss of £45,000 which was sought to be recovered by the legal process. Given this, HMRC advised that the six month penalty i.e. period 6 September 2011 to 5 October 2011 should be reduced to nil and the percentage rate charge reduced from 4% to 3%.

5 12. The Appellant had approached HMRC on 6 August 2012 to assist with payment arrears. This request was refused due to a late payment record going back to 2007. There appeared to be no actual payment deferral request for the monthly PAYE due for the period 2011/2012 and consequently there was no refusal for that period.

10 13. The Company has a long history of non compliance and HMRC records showed that the Company had paid late since 2007. The problem was on-going and did not just relate to 2011/2012. It was explained that cash flow difficulties are part of the hazards of trading and it was felt that the Company had not properly taken steps to adjust to and deal with their cash flow problems.

15 14. During 2010/11, HMRC warned the Company about penalties in their letter of 28 May 2010. It was felt that with this warning and impending PAYE late penalties, the Company should have taken steps to deal with their late payments.

15 15. The Company was alerted throughout 2011 and 2012 about late payments. There were eleven legal warning demands (P011).

20 16. With regard to absenteeism at the Company, HMRC indicated that this was discussed in June 2011 as part of the Company seeking time to pay arrangements. At no other point in 2011/12 did the Company contact HMRC to advise on absenteeism.

25 17. It was explained that the BPSS was created to support businesses in overcoming short term cash flow problems. If arrangements are made after the due date for payment a penalty may still be levied. The correspondence indicates that the Appellant did discuss time to pay arrangements with HMRC on 13 June 2011 and absenteeism on the 23 June 2011.

18. It was felt that given the Company's past history of late payment, it was not a one-off situation. Lack of funds is therefore not a viable excuse in this situation.

### **Relevant Statutory Provisions**

30 19. Schedule 56 Finance Act 2009 which deals with penalties, appeals and reasonable excuses. An insufficiency of funds is not a reasonable excuse.

### **Appellant's submissions**

20. In their Notice of Appeal dated 8 November 2012, the Appellant made the following points.

35 21. The company has traded since 1971. Given the present economic climate trading has been difficult.

22. Since 2007, the business has suffered financially which has meant changes to the way the business is run. This has included implementation of a staff reduction policy by way of redundancies, pay freezes across the workforce, reduction of salaries for management and directors, closure of storage facilities and aggressive negotiation with suppliers. The business continues to employ 18 people with a reduced workforce.

23. The company has strived to make regular PAYE payments despite falling behind in the years between 2007 and 2011. The penalty relates to PAYE late payments in 2011/12 and despite requesting assistance for time to pay arrangements, was refused; the Company has managed still to make payments to HMRC.

24. The company had a bad debt of £45,000 which they are seeking to recover by legal means.

25. The Appellant questions the review letter which stated “the Company’s cash flow problems are not beyond those expected in the course of business in difficult economic circumstances”. The Appellants say that they have survived two recessions prior to the present one and have always made arrangements to deal with the economic climate and to survive. They have made similar arrangements in their present circumstances.

26. The Appellant feels that the penalty imposed is disproportionate to the offence committed.

27. The Appellant submitted its main argument based on the “Bradford Factor”. This is a human resources management tool which is used to measure worker absenteeism. It calculates a score for each employee’s absence in a year. The higher the score, the more disruptive the employee’s absence to the Company.

28. In the 2011/12 there were 352 days of absence by workers. This caused significant disruption to the Company’s business. The effect was to cause repair work to machines to be significantly delayed and therefore payments by customers to be delayed. Normally customers pay an initial deposit and pay the full invoiced amount on completion of the repair work on contracts of between £10,000 and £600,000. The work is specialised and engineers are specially recruited from different parts of the country. They cannot easily be replaced if absent. The fact that an engineer with a particular expertise would be absent from work is very disruptive and impacts on the timeline for completion of the customer contract which in turn impacts on cashflow.

29. The Appellant say the lateness in paying HMRC was due in a significant way to worker absenteeism in a specialised industry with specialised workers. This caused the company to be continually late in making their payments in 2011/12 period. Their cash flow difficulties were largely cause by worker absenteeism.

30. They say this was made clear to HMRC and in particular to Mr Terry Collier, HMRC Officer, who attended the company on a monthly basis.

## **Respondents Submissions**

31. The Respondents say that insufficiency of funds is not a reasonable excuse unless it can be attributed to events which are outside the control of the Appellant. There is no reasonable excuse in this case. The Company's past history suggest that  
5 paying PAYE late was "the normal rather than a one off situation".

32. The Appellants were late in presenting their PAYE payments since 2007 so time to pay arrangements were declined for good reason.

33. The Company has been in business since 1971 and should be aware of their obligations as tax payers meet their compliance.

10 34. The Appellant received several warnings regarding penalty defaults and late payments. They were aware of the penalty regime and were put on notification regarding the implications.

35. The Respondents also draw reference to the review letter and the points made in that letter which were highlighted earlier in this decision.

## **15 Conclusions**

36. Whilst the legislation states that insufficiency of funds does not constitute a reasonable excuse, the cause of that insufficiency, which is to say the underlying cause of the default, might do so. This concept was tested in the case of *JB Steptoe*  
CA July 1992, [1992] STC 757.

20 37. In this case, the Appellant was an electrical contractor whose main customer was a local council which encountered for a significant part of his income. There was a great delay in the Council making payments which caused acute cash flow difficulties for the Appellant. This meant that returns and payments were late. The Tribunal (Lon/89/745Z) agreed that he had suffered unforeseeable and unavoidable  
25 misfortune and granted his appeal.

38. The Commissioners appealed to the High Court and then the Court of Appeal on the grounds that lack of funds was specifically excluded in law and from being a reasonable excuse. The findings of the Tribunal were upheld. These courts explained that it was only if the events giving rise to the insufficiency of funds were "outside of  
30 the normal course of the taxpayers business that a possibility of reasonable excuse can arise".

39. In that decision, a distinction was drawn between a shortage of funds and a reasonable excuse where there were a series of unforeseen circumstances which led to the shortage of funds.

35 40. The question which therefore has to be asked is, did those unforeseen circumstances lead to the shortage of funds? In other words could the trader have reasonably foreseen the insufficiency of funds or was faced with a more immediate cash crisis arising from events which were outside of their control. In looking at this

issue, the court should also looked at the efforts made by the Appellant to deal with the difficulties and the steps taken in obtaining alternative finance to deal with the cash flow difficulties.

5 41. In looking at the question of whether illness amounts to a reasonable excuse a critical factor is whether there has been illness of key employees.

10 42. The Appellant is in a specialised industry with specialised workers. They receive payment from their customers on completion of their contract work. If employees are ill, this would delay their payments and it would delay the completion of the work. It would not be easy to find employees to replace these key specialist workers. There are very few companies operating in this sector with these specialised machines. It would be difficult to make adequate provision for the absence of these key workers in advance.

15 43. The Appellants acted sensibly. They had taken significant steps in the present economic climate and over the years to reduce their workforce, take pay reductions and freezes and to streamline the business to be a viable economic proposition in difficult times. The company continued to trade and to pay all its tax bills. This is commendable. It is clear that on 13 June 2011, the Appellants did approach the BPSS to deal with debt management and time to pay arrangements. This was refused by Officer Collier. It seems that Officer Barratt had a different approach and within a short period of time, after quantifying the debt and recalculating, the Appellants were able to move into a period where they were no longer in default. It is unfortunate that this was not considered by Officer Collier at an earlier time and arrangements made which would have put the Appellant in a better economic position.

25 44. The question for the Tribunal is whether the Appellants had a reasonable excuse for their late payments. The Tribunal believes that taken as a whole, the Appellants acted in a reasonable manner, sought advice and were honest and upfront with their financial difficulties. They took reasonable steps to deal with these difficulties and to inform HMRC.

30 45. The important point is that the absenteeism of workers had a knock on effect on the cash flow and resulted in customers not paying for completed work on time, which in turn created cash flow problems. The Tribunal believes that there is a reasonable excuse based on the facts of this case. The Tribunal thinks that a reasonable competent businessman would have defaulted in making payments when faced with the same or a similar predicament. Such a person would have found themselves in exactly the same position in 2011/12, when faced with 352 days of absence by key workers and would not have had better foresight than that of the Appellant. Their situation is entirely reasonable.

40 46. The Appellant did exercise due diligence and have proper regard to their tax obligations. They acted as competent business people with a proper regard to their tax obligations. They continued to pay all of their outstanding tax. At present, they are not in default. They did shed some of their workforce to improve their cash flow.

They took steps to make the business profitable. They reacted in a fair and businesslike manner with the demands on their available cash resources.

5 47. In the circumstances, given the absence of key workers through illness and the unfortunate delay this caused in completing contracts and being paid, there is no question that the underlying reason for the late payment and insufficiency of funds within the company did amount to reasonable excuse.

48. The Tribunal does not accept that the absenteeism in 2011/12 was a “normal hazard of trade” as suggested by the Respondents.

49. The Appeal is therefore allowed.

10 50. 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  
15 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

20 **DR K KHAN**  
**TRIBUNAL JUDGE**

**RELEASE DATE: 7 March 2013**