



**TC02717**

**Appeal number: TC/2012/02956**

*Penalty – late payment of PAYE and NICs payments – FA 2009, Sch 56 –  
whether reasonable excuse for late payments – no – whether special  
circumstances – yes – appeal allowed in part*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**CLAYGOLD PROPERTY LTD**

**Appellant**

**- and -**

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

**TRIBUNAL:    JUDGE JILL C GORT  
                  DR CHRISTINA HILL WILLIAMS DL**

**Sitting in public in Reading    on 29 January 2013**

**Mr J Bevins, Managing Director for the Appellant Company, appeared on its  
behalf.**

**Mr P Reeve, Officer, appeared on behalf of the Respondents**

## DECISION

1. This is an Appeal against a decision of the Commissioners on 22 September 2011, subsequently amended on 10 April 2012, that the Appellant (“Claygold”) did not have a reasonable excuse for making late payments of its PAYE/NIC liabilities for the year ended 5 April 2011. The initial decision was to impose a penalty in the sum of £9,701.84 but this was subsequently reduced to £6,151.01.

2. By its Notice of Appeal dated 8 December 2011, Claygold referred to cash flow problems, to the fact that the bank would not provide an overdraft, that it had in the past paid by split payments every two weeks, that it had in the last three years had to cut over four to five members of staff and if the fine were imposed it would have to lose two to three more staff, and the company was fighting to stay in business.

### Legislation

3. Schedule 56 Finance Act 2009 allows a penalty to be charged when an employer fails to pay to HMRC its monthly PAYE/NIC payment by the due date.

The penalty date for this is the day after the date determined by or under PAYE regulations as the date by which the amount should be paid.

These are:-

- Manual payment 14 days after month end (fifth of each month) so due Nineteenth, penalty date twentieth. (*Miss Gort does this read better than numbering?*)
- Electronic payment 17 days after month end (fifth of each month) so due twenty - second penalty date twenty-third. (*ditto as above*)

Paragraph 6(1) provides that an employer is liable to a penalty of an amount determined by reference to the number of defaults made during the tax year.

Paragraph 6(2) specifies that a default occurs if the employer fails to pay an amount of tax in full on or before the due date i.e. 19<sup>th</sup> or 22<sup>nd</sup> of the month (depending on the method of payment).

Paragraph 16 provides that if there is a reasonable excuse for the failure to pay on time then there will be no penalty, but Paragraph 16 sub-paragraph (2) states that:

- an insufficiency of funds is not a reasonable excuse, unless attributable to events outside an employer’s control.
- the reliance on somebody else to do something is not a reasonable excuse, unless reasonable care was taken to avoid failure.

- if there was a reasonable excuse for the failure that excuse is deemed to have continued if the failure is remedied without unreasonable delay once the excuse ceased.

5 Paragraph 9 (Special Reduction) provides for a penalty to be reduced if HMRC think it right to do so because of special circumstances. It states:

“(1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of the Schedule.

(2) In sub-paragraph (1) “special circumstances” does not include;-

(a) ability to pay, or

10 (b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(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.”

15 Paragraph 13 provides the taxpayer with a right of appeal:

Para 13 (1) against a decision by HMRC that a penalty is payable

Para 13 (2) against a decision of HMRC as to the amount of a penalty

On an appeal under Paragraph 13(1) the tribunal may affirm or cancel the decision – Paragraph 15(1)

20 (4) Regulation 69 Income Tax (PAYE) Regulations 2003 defines the due date for the monthly PAYE payments as:

(i) within 17 days after the end of the tax period, where payment is made by an approved method of electronic communications, or

(ii) within 14 days after the end of the tax period, in any other case

25 c) Regulation 67 and Schedule 4 to the Social Security (Contributions) Regulations 2001 imposes the same requirements on an employer for the purpose of paying earnings related National Insurance Contributions.

30 (5) The above penalty regime came in on 6 April 2010; the penalties are structured on a sliding scale, the more late payments in a tax year, the larger the percentage penalty applied to the aggregate of the late payments. The first default in any year is disregarded altogether. The remaining defaults trigger a penalty of 1%, 2%, 3% or 4% depending on their number. A 4% penalty is payable if there are ten or more defaults during the tax year. In the present case HMRC assessed a penalty at the 3%

rate which is applicable if a taxpayer makes 7, 8 or 9 defaults during the tax year, and the 3% is based on the amount of the tax comprised in the total of those defaults.

### **The Evidence**

4. The Commissioners provided us with a bundle of documents, the Appellant  
5 provided no documentary evidence but Mr Bevins gave oral evidence at the hearing.  
We found him to be a competent and credible witness.

5. We were not provided with very much information about the actual background,  
and in particular we were not provided with any accounts or bank statements on  
behalf of Claygold. We should say that we find it surprising that in a direct tax  
10 reasonable excuse case the Commissioners did not ask the taxpayer to provide such  
evidence as is usual in a Value Added Tax case where there is provision for a  
reasonable excuse. Mr Bevins, the Managing Director of Claygold, had set up the  
company as a property business in 1992 and had achieved a turnover of £4.5m and  
employed 89 people. After the property crash of 2007, the company had considerable  
15 cash flow problems, as did so many others in the property business. In order for the  
company to survive, Mr Bevins had remortgaged his own house and buildings (we  
were not told which buildings) and he and a man we believe to be a co-director of  
Claygold put in £800,000. Forty five members of staff were laid off. Additionally, in  
February 2008, the bank had withdrawn the company's overdraft, which had stood at  
20 between £150,000 and £170,000. The facility was not renewed until about February  
2008, but then only at the level of £50,000 whereas it was considered by Mr Bevins  
that the Company needed £120,000 to solve its cash flow problems.

6. The evidence shows that the company paid its PAYE late on every occasion  
through the tax years 2007, 2008 and 2009, but in 2010 there were a few occasions  
25 when the tax was paid by the due date. We learn from Mr Bevins that he had had  
little education, and was dyslexic. In September 2009 he had had a heart attack.

7. Mr Bevins believed that regular calls had been made to the Commissioners  
requesting time to pay late and that the company had been allowed by the  
Commissioners to pay its PAYE late. The company employed a book keeper, Mrs  
30 Williams. Between 2007 and March 2010 it was possible for employers to delay  
payments to the Commissioners without incurring penalties, although a 'Notice  
requiring payment' would be sent out informing the taxpayer that if payment was not  
made within 7 days of the issue of the Notice, the specified amount "may be  
recovered by distraint without further warning". The evidence shows that such  
35 notices were issued to Claygold on three occasions in 2009, and it appears that the  
same type of form was issued on 24 April 2010, 27 May 2010, 24 November 2010,  
and 7 March 2011. We were not given any copies of letters which had actually been  
sent to Claygold, either in 2009, 2010, or 2011, although Mr Reeve informed us that  
40 on at least one occasion a letter had been specifically sent to Claygold notifying it that  
the Commissioners "will take action against employers and contractors who do not  
pay their PAYE on time and who do not have a time to pay agreement." All we saw  
was a generic version of this letter which was said to be sent out by the  
Commissioners to each taxpayer when they became due for a penalty. The

Commissioners' records refer both in 2009 and 2010 to 'PO1 issued'. We were shown an example of what we were told by Mr Reeve was Form P101, and that is the form of letter already referred to threatening distraint if payment is not made within 7 days.

5 8. We were provided with the Commissioners' computerised records of contact with Claygold. We note that in 2009 there is a record of contact of one form or another on eight occasions. These vary from a record of the issue of a form P101, of which there were three sent out, two calls to the taxpayer and two calls from the taxpayer. Mr Reeve referred to the evidence as showing that on only two occasions,  
10 namely April 2009 and the end of March 2011, had an arrangement to pay been allowed by the Commissioners. Claygold had paid the tax regularly, (although always late) and always in two instalments throughout the years 2007 to 2010, and there had been fairly regular telephone calls from the Commissioners to Claygold about the payments. Unfortunately from Mr Bevin's point of view, the calls from Claygold had  
15 not been made in anticipation of late payment but in response to calls from the Commissioners after the due date had passed and therefore the late payment attracted a penalty in every case. The call on 30 March 2011 was in fact made after the liability became due, but the Commissioners had failed to issue a penalty on that occasion and no penalty has been imposed in respect of that period subsequently.

20 9. Whereas in 2009 there was fairly frequent contact between the Commissioners and Claygold, the last recorded contact was on 27 November 2009 and there was no further recorded contact until 28 April 2010, by which time the new penalty regime was in force. On 28 April the Commissioners telephoned Claygold and the call was returned on the same day. The content of the call is recorded as follows: "Cash flow goes in three/four month cycles, loss even profit. Has only last week been given an overdraft (sic) on his account." On 29 April 2010 a P101 was issued in respect of tax year April 09-10. On 27 May 2010 a further P101 was issued in respect of 6 April 2010 to 5 May 2010. Not until 30 March 2011 is there a note to the effect that the taxpayer was advised of the penalties. On 25 July 2011 and 24 August 2011 there are  
30 further notes to this effect and 24 August 2011 it is recorded that "says knows about these".

### **The Commissioners' case**

10. The Commissioners' case is straightforward: Claygold paid all 12 of its monthly PAYE payments late from April 6 2010 to April 5 2011. Whilst originally charged a  
35 penalty in respect of all the months from month 2 to month 12 inclusive, the total penalty amounting to £9,701.84 having been charged at 4%, following the Appellant lodging his Appeal and the decision in the case of *Agar Ltd* TC/01625, the assessment was subsequently amended by the removal of the penalties in respect of months 11 and 12. The effect of this was that the rate at which the penalty was charged was  
40 lowered from 4% to 3%, giving a total penalty of £6,151.

11. It was submitted that cash flow did not amount to a reasonable excuse in this particular case, the events such as the property crash had happened too long before for Claygold to be able to rely on it. It was Claygold's habit to pay late and there was no

particular event that had “led to a flip in an otherwise impeccable payment record”, which Mr Reeve understood to be “what ..... the legislation wants us to consider in respect of whether or not a cash flow problem can be considered to be a reasonable excuse.”

5 12. We were referred to the case *Rodney Warren & Co* TC.01754 where at paragraph 45 Judge Hellier had said:

“.... in order for an event to exculpate a taxpayer from a default it must be a reasonable excuse ‘for’ the default: in other words there must be a causal link between the event and the default....” It was submitted by Mr Reeve that this meant that an  
10 additional reason for late payment did not amount to a reasonable excuse if an employer was already paying late. This we do not find to be a correct interpretation of the law by Mr Reeve, whatever is proffered as a reasonable excuse must be examined on its merits, although earlier behaviour is often very relevant to the question of whether or not there is a reasonable excuse.

15 13. With regard to Claygold’s intention that there was an agreement with the Commissioners to make payments every two weeks, whilst it was conceded that this had happened on two occasions, there was no such continuing agreement because such an agreement would be unfair to the other employers who paid on time. The record of telephone calls showed HMRC continually chasing Claygold for payment  
20 which would not have happened if an arrangement were in fact in place. Mr Reeve pointed to the Enforcement Notices which were issued with the threat of distraint as showing no agreement being in place. In respect of there having been no correspondence or calls from the Commissioners letting Mr Bevins know of the liability to a penalty, a penalty warning letter had been issued on 28 May 2010,  
25 although Mr Reeve was not able to produce a copy of that letter. It was claimed also that Mr Bevins had been warned about the penalties when he called the Commissioners on 27 May 2010, but the record does not show that this is the case. We were referred to the case of *Dina Foods Ltd* TC.01546 in respect of the Notices issued by the Commissioners, where at paragraph 37 Judge Berner said: “We are of  
30 the view that no 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.” We were also referred again to the case of *Rodney Warren & Co* (supra) at paragraph 47 where Judge Hellier stated: “The obligation is to make payment: the lack of a warning (or  
35 early assessment) of a penalty is not an excuse for failing to make payment....”

### **The Appellant’s case**

14. Claygold claimed a reasonable excuse on the basis that there was an arrangement to pay the monthly PAYE by two cheques each month, one on 15<sup>th</sup> and one at the end of the month. Furthermore at no time were they informed that costly  
40 penalties for late payments would be incurred, and finally it had been difficult to keep the company going because of the then current economic climate and the company had financial problems. It was pointed out that all the PAYE owing for 2010/11 had been paid and the company was up to date with its payments for 2011/12.

## Considerations and reasons for Decision

15. Whilst to succeed in this appeal and have the penalties discharged, Claygold must show on the balance of probabilities that it had a reasonable excuse for the late payment, if it fails to establish as a matter of law that there is a reasonable excuse, it is nonetheless available to the company to persuade the Commissioners or the Tribunal that there are special circumstances which would make it right for the penalty to be reduced. This power is given to the Commissioners by paragraph 9 of Schedule 56, and to the Tribunal by paragraph 13(2) of Schedule 56. The Commissioners did not in this case consider whether there were any special circumstances and we have referred to no authorities as to what might constitute special circumstances. We will return to the matter of whether any exist in this case below.

16. With regard to reasonable excuse, we have carefully considered the matters put forward by Mr Bevins on behalf of Claygold and do not find that any of the matters put forward by him initially or which have emerged in the course of a hearing amount to reasonable excuse. Cash flow can only amount to a reasonable excuse if its occurrence is caused by an unexpected event outside the taxpayer's control, and if it has occurred sufficiently proximately to the occurrence of the default(s) in question. Six months is generally considered to be the length of time beyond which such an event will no longer constitute a ground for a reasonable excuse. In Claygold's case the precipitating causes of the cash flow problems were initially the property crash in 2007 and then later the withdrawal of its overdraft facility in 2008. Neither of these events is in our judgment sufficiently proximate to the defaults in the 2010-11 period to give Claygold grounds for a reasonable excuse, particularly since at the start of the 2010-11 tax year Claygold had been granted an overdraft of £50,000.

17. With regard to Mr Bevins claim to have an arrangement with the Commissioners to pay the PAYE by two instalments, for the reasons given by Mr Reeve, we did not accept that this was the case. Careful examination of the Commissioners' phone records shows that more often than not, it was the Commissioners who called Claygold enquiring about the late payments, and this was the pattern throughout 2009-2010. Whilst this pattern did change in 2010, and the Commissioners no longer made regular calls, they did call in April, Claygold called them in May but there were no calls from the Commissioners after that until 26 October. We accept Mr Reeve's submission that if Mr Bevins had believed that Claygold had an arrangement to pay late and by instalments as claimed, he might have been expected to query the issuing of the P101's in May and October, which he did not.

18. At some stage Mr Bevins became aware of the penalty regime, but the only record of this is on 24 August 2011 (after the year in question) when he was specifically told about it and he replied that he knew about it.

19. The legislation does not require the Commissioners to issue warnings to individual employers, although in circumstances where, as here, an employer has regularly been contacted by the Commissioners in the year prior to the coming into force of a new regime it might be hoped that a clear and specific warning would be given to such an employer. There was evidence of the details of the new legislation

being widely circulated to all employers and it was not suggested by Mr Bevins that that was not received by Claygold. It is a fact that under the new legislation the first default would not have attracted a penalty and so only a warning letter would have been issued. The facsimile warning letter that we saw was in very small print, and we saw no evidence of a warning letter having been sent to Claygold, although we accept Mr Reeve's evidence that the Commissioners sent out such letters to all defaulting taxpayers. In this case we do not find that a failure on the part of the Commissioners to issue a specific warning to Claygold is capable of amounting to a reasonable excuse.

20. With regard to special circumstances, Mr Bevins had had little education, was dyslexic, and had had a heart attack in September 2009, some six and a half months before the start of the tax year in question. It is evident that the company had paid its PAYE in two instalments for a considerable period of time. We were told that Mr Bevins had tried for some time to ease the company's cash flow by going onto monthly VAT returns but had not been allowed to do so because Claygold was never sufficiently up to date with its payments for this to happen. We have looked at the pattern of telephone calls between Claygold and the Commissioners, and have commented above on the frequency or otherwise of them, and whilst none of the above matters provide Claygold with a reasonable excuse for the late payment, as stated above, we nonetheless find that in this case the combination of matters set out in this paragraph are capable of amounting to special circumstances. It was evident to us that Mr Bevins has quite severe dyslexia, and this, combined with his comparatively recent heart attack, and the pattern of trading which Claygold had developed and its relationship with the Commissioners over the preceding years, we find are sufficient to amount to a special circumstance for Claygold's failure to pay its PAYE/NIC contributions by the due date in April, May and June 2010. We add that we do not consider that the Commissioners' failure to have considered the existence of special circumstance is to be criticised. We only learned about the heart attack and the dyslexia in the course of the Hearing. In the exercise of the powers given to us by paragraph 13(2) of Schedule 56 we allow this Appeal to the extent only that we direct that Claygold should no longer be deemed liable for a penalty in respect of months 2 and 3.

21. 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.

**JUDGE J C GORT**  
**TRIBUNAL JUDGE**

**RELEASE DATE: 3 May 2013**