



**TC03790**

**Appeal number: TC/2014/02527**

*INCOME TAX – in-month penalties for late payment of PAYE – whether appeal notified late – HMRC’s “view of the matter in question” – whether HMRC had notified the company – failure to notify – effect on time limits and quantum – Agar considered – whether payments made late – reasonable excuse – special circumstances – appeal dismissed – penalty varied.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**THAMES & NEWCASTLE LTD**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE ANNE REDSTON  
MR RICHARD THOMAS**

**Sitting in public at 45, Bedford Square, London WC1 on 27 June 2014**

**Mr Stanley Leask, director of the Appellant, for the Appellant**

**Mr Stephen Goulding of HM Revenue and Customs’ Appeals and Reviews Unit,  
for the Respondents**

## DECISION

### Introduction and summary

1. This is the appeal of Thames & Newcastle Limited (“the company”) against an penalty assessment of £4,706.21 for late payment of Pay As You Earn (“PAYE”) and Class 1 National Insurance Contributions (“NICs”)<sup>1</sup> for the 2011-12 tax year.

2. The penalty was issued on 17 July 2012. The company appealed to HMRC on 14 August 2012, and asked for a statutory review. On 11 October 2012 the HMRC Review Officer included a further month in the penalty calculation. This had the effect of increasing the penalty to £5,447.74. On 8 May 2014, some seventeen months later, the company notified the appeal to the Tribunal. In its Notice of Appeal it sought permission to notify the appeal late.

3. Although an HMRC review had been carried out, the Tribunal found that it was not a statutory review. As a result, the 30 day deadline to notify the appeal to the Tribunal did not apply, and the appeal was therefore not notified late. Another consequence was that the company’s appeal was against the original penalty, ie not that increased by the HMRC Review Officer.

4. The company’s Notice of Appeal stated that (a) that some of the payments were made on time, and (b) for those which were late there was a reasonable excuse.

5. The Tribunal found that none of the payments was made on time, and the company did not have a reasonable excuse.

6. In addition to the late payments which formed the basis of the penalty assessment, we found that two other payments had also been made after the due date without a reasonable excuse. One of these was the payment which the Review Officer had included in the penalty calculation.

7. We dismissed the company’s appeal and varied the penalty so as to include that late payment. As a result, the penalty is £5,447.74.

### The issues

8. The issues before the Tribunal were:

(1) whether the company’s appeal had been notified late, and if so, whether the Tribunal agreed to give permission for a late appeal;

(2) whether any of the monthly PAYE amounts were paid after the due date;

(3) whether the company had a reasonable excuse for any late payments; and

(4) if payments had been made late, and there was no reasonable excuse, whether the Tribunal should uphold or vary the penalty.

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<sup>1</sup> References in this decision notice to PAYE should be read as including employee Class 1 NICs, unless the context otherwise requires.

## **The law**

9. The legislation relevant to the appeal is set out as an Appendix to this decision. The main provisions are as follows:

- 5 (1) the legislation relating to the late appeal issue is at Taxes Management Act 1970 (“TMA”) ss 49A – 49I;
- (2) the legislation imposing penalties for late payment of PAYE is at Finance Act 2009, Schedule 56 (“Sch 56”);
- 10 (3) the regulations setting out the date on which PAYE must be paid are in the Income Tax (Pay As You Earn) Regulations 2003, and the related NICs provisions are in the Social Security (Contributions) Regulations 2001.

## **The evidence**

10. HMRC provided the Tribunal with a document bundle which included:

- (1) the correspondence between the parties and between the parties and the Tribunal;
- 15 (2) computer records relating to the issue of warning letters to the company, and an “Action History Record” setting out contact between the company and HMRC;
- (3) copies of cheques sent by the company to HMRC, along with the relevant payslips; and
- 20 (4) Employer Bulletins and other documents relating to the penalty regime for late payment of PAYE.

11. The company supplied the Tribunal and HMRC with the following:

- 25 (1) a schedule of invoices raised by the company in the period from 10 November 2011 to 31 August 2012, showing the due date for payment, the date paid, and a calculation of the number of days late;
- (2) copies of the company’s bank statements for the period from 3 November 2011 to 12 September 2012; and
- (3) the company’s accounts for the year ended 31 October 2012.

30 12. Mr Stanley Leask, one of the two directors and a shareholder of the company, gave oral evidence in the course of his submissions.

## **Was the appeal notified late?**

13. We find the following facts from the documents in HMRC’s bundle:

- (1) On 17 July 2012, HMRC issued a notice of a penalty assessment to the company.
- 35 (2) On 14 August 2012, the company replied to HMRC and acknowledged that some payments were late but claimed that it had a reasonable excuse, namely cash flow issues.

5 (3) On 21 August 2012, HMRC treated (2) as an appeal. Mr Sharpe, an officer of HMRC, disagreed with the company's reasonable excuse submission and stated that "legislation does not allow HM Revenue and Customs to take [cash flow problems] into consideration when raising penalties" and "if you do not agree with my decision, you can ask for...an internal review."

(4) On 19 September 2012, the company asked for a review.

(5) On 26 September 2012, Miss MacDonald, an HMRC officer, asked the company for "any more information you want me to take into account as part of my review."

10 (6) On 11 October 2012, a different HMRC officer, Mr Doggett, notified the company of the conclusions of his review, which was to increase the penalty to £5,447.74 on the basis that there were nine defaults, not eight. Mr Doggett informed the company that if it disagreed with HMRC's conclusions, it should notify its appeal to the Tribunal.

15 (7) On 13 May 2014, after further correspondence, the company notified its appeal to the Tribunal, and in its Notice of Appeal the company asked for permission to notify late.

20 14. The documents referred to in (1) and (2) above are a valid assessment and appeal to HMRC respectively, and by virtue of Sch 56, para 14(1), the TMA review provisions apply.

15. As a result, HMRC was entitled, but not obliged, to offer a review (s 49A(2)(b) TMA) or, failing that, the company was entitled, but not obliged, to ask for one (s 49A(2)(a) TMA).

25 16. HMRC's letter of 21 August 2012 did not offer a review, but merely informed the company that it could ask for one. On 19 September 2012, the company asked for a review, so falling within s 49B(1) TMA.

17. As a result of that request, HMRC had to do two things (s 49B(2)):

30 (1) notify the company of its view of "the matter in question." This phrase is defined as "the matter to which the appeal relates" (TMA s 49I(1)(a)). The notification must be carried out within 30 days of the request for review or within any longer reasonable period (s 49B(2) and (5)); and

35 (2) review "the matter in question." In performing that review HMRC must take into account any representations made by the company, providing they are received at a stage of the review which allows HMRC a reasonable opportunity to consider them (TMA s 49E(4)).

18. On 26 September 2012, Miss MacDonald did not notify the company of HMRC's view of the matter in question. Instead, she simply asked the company for any representations. We assume this was because she considered HMRC's view of

the matter had already been set out, in perfectly adequate fashion, in Mr Sharpe's letter of 31 August 2012.

19. Providing the appellant with HMRC's "view of the matter in question" is however mandatory, see s 49B(2) and s 49C(2). In some cases – such as this one –  
5 the requirement may appear to be a mere technicality, adding nothing to the process, but in others it has real practical importance. When a appellant makes an appeal to HMRC against a direct tax assessment (or an amendment to a return), this may be only the starting point for further negotiations. Eventually, HMRC may offer a review, or the appellant may request one. During the period between the appellant's  
10 appeal and the start of a review, HMRC's "view of the matter in question" may have changed substantially: the parties may have raised new arguments, or provided further documents, as a result of which they may have abandoned or modified earlier positions. It is clearly sensible that the Review Officer first set out HMRC's current view of the matter in question before the review is undertaken.

20. In this context it is highly relevant that, if no review is offered or requested, there is no statutory time limit by which an appellant has to notify its appeal to the Tribunal, see TMA s 49D. There is also no statutory time limit within which HMRC may offer a review, or the appellant request one (TMA ss 49B and 49C). In other words, the structure of the statutory review regime allows for the flexibility discussed  
20 in the previous paragraph. We note by way of parenthesis that the position is different for VAT and indirect taxes, where HMRC is obliged to offer a review.

21. Since the requirement to provide HMRC's view of the matter in question is mandatory, it applies even in cases where there is no further correspondence or negotiation, such as this one. This may seem onerous, but it seems to us that  
25 complying with the requirement does not necessarily involve repeating what has already been said: for example, Miss MacDonald's letter of 26 September 2012 letter could simply have referred back to Mr Sharpe's letter, incorporating his conclusions by reference.

22. Once the statutory review has been completed, s 49E(6) requires HMRC to  
30 notify their conclusions and reasoning to the appellant within "the period of 45 days beginning with the relevant day." When, as here, it is the appellant who has requested the review, the relevant day is "the day when HMRC notified the appellant of HMRC's view of the matter in question." If no such view has been notified, the time limit has not begun to run.

23. We also considered TMA s 49E(8) and (9), which provide a default position  
35 when HMRC have delayed issuing their conclusions. In such a case, HMRC's "view of the matter in question" is taken to be the conclusion of the review. Here, no "view of the matter in question" has been given, so this default position cannot operate.

24. As a result, we find that HMRC's failure to provide the company with its "view  
40 of the matter in question" means no statutory review has been carried out. Although Mr Doggett did carry out a review, it was non-statutory and so did not affect the company's right under s 49D(2) to notify its appeal to the Tribunal, a right which is

not limited in time. The legislation explicitly states that an appellant only loses this right where HMRC has notified its view under s 49B or s 49C, see s 49D(4)(a).

25. The company's appeal was therefore not notified late, and so there was no requirement for the Tribunal to consider its application for permission to appeal out of time.

### Issues about quantum

26. We also considered a number of questions about which tax months potentially fell within the penalty regime as it applied for 2011-12.

27. The Month 12 payment is due after the end of the tax year – on 19 April if paid by cheque and 22 April if paid electronically. The wording of the legislation means that Month 12 of a given tax year cannot not form part of the penalty calculation for that tax year (see *Agar v R&C Commrs* [2011] UKFTT 773 (TC)).

28. The company made two payments after the end of the 2011-12 tax year, one on 24 April 2012 and one on 3 May 2012. The original penalty assessment had treated both as Month 12 amounts and not taken them into account when working out the penalty. It was therefore calculated as £4,706.21, based on eight defaults.

29. On 11 October 2012 Mr Doggett decided that the 24 April 2012 payment should have been allocated to Month 11 and not Month 12. As result, there were nine defaults and the penalty increased to £5,447.74. Mr Leask confirmed to us that the 24 April payment related to Month 11.

30. However, as set out in the previous section of this decision notice, Mr Doggett's review was not a statutory review. In consequence, the penalty notified to the Tribunal remains that in the original assessment.

31. We also noted that *Agar* concerned the first year of the Sch 56 penalty regime, so it was not possible to include month 12 of the previous year. This case concerned 2011-12, the second year of the penalty regime. Mr Goulding agreed with the Tribunal that if the company had paid late in the final month of 2010-11, HMRC could have included that month in its schedule of defaults. However, neither party put forward any evidence as to when the company had paid its PAYE for that month or made any related submissions.

32. Finally, we observed that a payment made on 6 September 2011 had been allocated to Month 4. The next two payments were on 12 October and 2 November 2011. HMRC had allocated both of these to Month 6, and treated Month 5 as nil. As a result, the penalty calculation did not include Month 5. Mr Leask told the Tribunal that the payment made on 12 October 2011 was for Month 5 and so Month 5 had also been late.

33. At the end of our decision we discuss whether or not to vary our decision so as to include Month 5, Month 11, and/or Month 12 of 2010-11 in the penalty.

**Were any of the PAYE payments late?**

34. The company's Notice of Appeal stated that:

(1) the payment for June 2012 had been made late only because a cheque was not received and had to be reissued;

5 (2) the payments for July 2011, September 2011 and March 2012 were all made on time;

(3) the December 2011 cheque was issued on time but possibly delayed because of the Christmas post;

10 (4) cheques for January and February 2012 were issued on time but delayed due to a postal strike.

35. Mr Leask initially confirmed to the Tribunal that he was maintaining the position that some of the PAYE payments included in the schedule of defaults had been made on time.

15 36. However, when the payslips and cheques in the HMRC bundle were put to Mr Leask, and he was asked further questions about the postal strike, he accepted that all the payments which the company had said were paid on time were in fact paid late.

**Reasonable excuse: the parties' submissions and further findings of fact**

20 37. We first set out Mr Leask's submissions in relation to reasonable excuse, including his responses to the Tribunal's questions. From this and the other evidence provided to us, we then make further findings of fact.

*Submissions by Mr Leask on behalf of the company*

25 38. Mr Leask said that the company is in the building trade in West London. He explained that in the period concerned, business conditions were very difficult. Customers were slow in making payments: in particular he identified one debt of around £100,000 which had been paid late. Income was thus slow and unreliable.

39. Outgoings, on the other hand, were pressing. Many suppliers required advance payments and he had to pay his employees on time. The company was squeezed between late paying debtors and demands for payment.

30 40. In reliance on the company's accounts, he said that turnover in the year to 31 October 2012 was £2,742,980, but profits before taxation were only £34,972, a profit margin of just over 1%. Margins were extremely tight and the company was having to tender for jobs in competition with up to five other builders. The company had considered overdraft finance and invoice financing but neither was available.

35 41. In summary, the company's case was that the documents brought to the appeal demonstrated an insufficiency of funds, and that this had caused the company to pay late. He also relied on the case of *Kincaid v R&C Commrs* [2011] UKFTT 225, which he said showed that cash flow problems could provide a reasonable excuse.

*Questions from the Tribunal*

42. Mr Goulding declined to cross-examine Mr Leask, but the Tribunal asked a number of questions.

43. We first considered the dates when the PAYE was due. It was clear from the bank statements that the company had sufficient funds to pay its PAYE at the due date for most of the late PAYE payments. We asked Mr Leask why the company had not made these payments on time. He said that he had to look ahead at other possible liabilities: if there was a choice to be made as to whether to pay suppliers, employees or subcontractors on the one hand, or HMRC on the other, he would prioritise the former.

44. The company's bank statements disclosed numerous transfers both to and from another account at the same branch. Mr Leask confirmed that this other account was the company's interest-earning "reserve account." He accepted that in the period covered by the statements over £500,000 was transferred into the current account from the reserve account, and a similar amount had been transferred in the other direction.

45. The bank statements also showed a number of payments to persons named Leask. Mr Leask told us that these included salaries paid to him and his father, who were both directors of the company, although these amounts were lower than they had been in better times; transfers of a lesser amount had been made to Mr Leask's mother. Payments to K Leask and S Wilton were to his father and his father's previous business partner for rent of the premises. In some periods no rent was paid to his father because things were tight.

46. Given that his father owned at least part of the company's premises, the Tribunal asked Mr Leask whether this could have been offered as security for an overdraft or other loan. Mr Leask said his father's equity in the premises was around £200,000. In addition, he owned his own house, although it was mortgaged. He accepted that funds could have been raised on the security of one or both of these properties.

47. We put to Mr Leask that his schedule showed that the debt of £100,000 (to which he had referred the Tribunal) had a due date of 7 August 2012 and was paid within 3 months of that date. Mr Leask agreed. We pointed out that neither date was within the tax year to which the appeal related, and again Mr Leask accepted this. He also accepted that this debt was the only large late payment out of all the debts listed on his schedule of invoices.

*The Tribunal's further findings of fact*

48. The company is in the building trade. It operated mostly in West London. At the relevant time no large payments were outstanding from debtors; the only late payments were for relatively small sums.

49. The company's net profits as shown in its accounts were only about 1% of its turnover. However, these profits were after the payment of salary to Mr Leask and

his father, who were both directors, rental payments to Mr Leask's father, and a payment to Mr Leask's mother.

50. The company paid its employees on time. If there was a choice between paying employees or HMRC, the company would pay employees. Similarly, the company would give priority to suppliers over paying its PAYE.

51. The company had sufficient funds in its bank account to meet its PAYE liability on almost all the due dates. Further, the company had another bank account from which payments were regularly made to cover shortfalls in the current account. Although the statements for this reserve account were not provided to the Tribunal, we noted that, in the period for which we were provided with bank statements, the company only once went into overdraft and then only by a small amount and for a short period. On all other occasions when the balance in the current account was low, a sum was transferred from the reserve account.

52. Both Mr Leask and his father had property assets from which funds could have been raised by way of mortgage.

*Mr Goulding's submissions on behalf of HMRC*

53. Mr Goulding said that the law restricted the "reasonable excuse" defence, so that an insufficiency of funds could only be a reasonable excuse if the reason for the insufficiency was outside the company's control. In this case there was no such external event: even the £100,000 late payment was not relevant to this period. In his submission the company had no reasonable excuse.

**Reasonable excuse: the Tribunal's decision**

54. The only excuse put forward by the company was that its cashflow problems caused the late payments. We reject this excuse for the following reasons:

(1) The company has not proved to our satisfaction that there was an insufficiency of funds at the relevant period: the company had other funds which are used to top up the current account as required.

(2) As Mr Goulding says, the law only allows an "insufficiency of funds" to provide a taxpayer with a reasonable excuse if the cause of the insufficiency is outside its control. That is not the case here.

(3) The company chose to pay its suppliers in priority to HMRC: instead of meeting its PAYE obligations on time, it made discretionary payments of rent and salary to the company's owners.

55. We also considered *Kincaid*. It is true that the appellant in that case had argued that he had "severe cashflow problems" (see [10] of that decision). However, the position was more complicated than simply shortage of funds, and very different from this case, see [19]. The issue in *Kincaid* was the withdrawal of gross payment status by HMRC, not late payments of PAYE; further, the "reasonable excuse" provision which was relevant to *Kincaid* did not exclude "insufficiency of funds" as is the case

here. In summary, there is no parallel between the facts, the issue or the law as between this case and *Kinkaid*.

56. We have no hesitation in finding that the company does not have a reasonable excuse for any of the late payments.

## 5 **Special circumstances**

57. Sch 56, para 9 allows HMRC to reduce the penalty “if they think it right because of special circumstances.” In *Clarks of Hove Ltd. v Bakers' Union* [1978] 1 WLR 1207, a decision of the Court of Appeal, “special circumstances” was said to mean “exceptional or out of the ordinary”.

10 58. There was no evidence that HMRC had considered the special circumstances provisions before they issued the penalty notice.

59. In *Algarve Granite v R&C Commrs* [2012] UKFTT 463 the Tribunal (Judge Brannan and Mr Howard) held that HMRC’s failure to consider whether or not special circumstances exist meant that the decision is “flawed” in a judicial review  
15 sense. We do not repeat their careful analysis here, but gratefully rely upon it.

60. Because HMRC did not consider special circumstances, the Tribunal must consider whether the penalty should be reduced. However, the legislation provides that “ability to pay” cannot constitute a special circumstance, see Sch 56, para 9(2)(a).  
20 No other reason for late payment has been put forward. As a result, although we have considered special circumstances as we are required to do, we have found that none apply to the company.

## **The Tribunal’s decision on the penalty**

61. The payments included in the original penalty calculation were made late. There is no reasonable excuse and no special circumstances.

25 62. The Tribunal has the power to affirm (i.e. uphold) the original HMRC penalty assessment of £4,706.21 or to make any other decision that HMRC has the power to make.

63. As stated earlier in this decision notice, Mr Doggett, the HMRC Review Officer had concluded that the company’s 24 April 2012 payment should have been allocated  
30 to Month 11 and not Month 12. As a result, there were nine defaults; the penalty increased to £5,447.74. Mr Leask has agreed that the 24 April 2012 payment was for Month 11.

64. Mr Leask also told us that the payment made on 12 October 2011 belonged to Month 5. As discussed earlier in this decision, no penalty has been charged for that  
35 month. Finally, no evidence has been put forward by either party as to whether Month 12 of the 2010-11 tax year was also late.

65. We decided to vary the penalty to include only the late payment for Month 11. As a result, the penalty due from the company is £5,447.74, the same as the penalty charged on the company after Mr Doggett's review.

**Appeal rights**

5 66. 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.

10 67. 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.

15

**ANNE REDSTON  
TRIBUNAL JUDGE**

**RELEASE DATE: 8 July 2014**

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## APPENDIX: LEGISLATION RELEVANT TO THE APPEAL

### TAXES MANAGEMENT ACT 1970

#### **49A Appeal: HMRC review or determination by tribunal**

- (1) This section applies if notice of appeal has been given to HMRC.
- 5 (2) In such a case—
- (a) the appellant may notify HMRC that the appellant requires HMRC to review the matter in question (see section 49B),
- (b) HMRC may notify the appellant of an offer to review the matter in question (see section 49C), or
- 10 (c) the appellant may notify the appeal to the tribunal (see section 49D).
- (3) See sections 49G and 49H for provision about notifying appeals to the tribunal after a review has been required by the appellant or offered by HMRC.
- (4) This section does not prevent the matter in question from being dealt with in accordance with section 54 (settling appeals by agreement).

#### **15 49B Appellant requires review by HMRC**

- (1) Subsections (2) and (3) apply if the appellant notifies HMRC that the appellant requires HMRC to review the matter in question.
- (2) HMRC must, within the relevant period, notify the appellant of HMRC's view of the matter in question.
- 20 (3) HMRC must review the matter in question in accordance with section 49E.
- (4) The appellant may not notify HMRC that the appellant requires HMRC to review the matter in question and HMRC shall not be required to conduct a review if—
- (a) the appellant has already given a notification under this section in relation to the matter in question,
- 25 (b) HMRC have given a notification under section 49C in relation to the matter in question, or
- (c) the appellant has notified the appeal to the tribunal under section 49D.
- (5) In this section “relevant period” means—
- (a) the period of 30 days beginning with the day on which HMRC receive the notification
- 30 from the appellant, or
- (b) such longer period as is reasonable.

#### **49C HMRC offer review**

(1) Subsections (2) to (6) apply if HMRC notify the appellant of an offer to review the matter in question.

5 (2) When HMRC notify the appellant of the offer, HMRC must also notify the appellant of HMRC's view of the matter in question.

(3) If, within the acceptance period, the appellant notifies HMRC of acceptance of the offer, HMRC must review the matter in question in accordance with section 49E.

10 (4) If the appellant does not give HMRC such a notification within the acceptance period, HMRC's view of the matter in question is to be treated as if it were contained in an agreement in writing under section 54(1) for the settlement of the matter.

(5) The appellant may not give notice under section 54(2) (desire to repudiate or resile from agreement) in a case where subsection (4) applies.

(6) Subsection (4) does not apply to the matter in question if, or to the extent that, the appellant notifies the appeal to the tribunal under section 49H.

15 (7) HMRC may not notify the appellant of an offer to review the matter in question (and, accordingly, HMRC shall not be required to conduct a review) if—

(a) HMRC have already given a notification under this section in relation to the matter in question,

20 (b) the appellant has given a notification under section 49B in relation to the matter in question, or

(c) the appellant has notified the appeal to the tribunal under section 49D.

(8) In this section “acceptance period” means the period of 30 days beginning with the date of the document by which HMRC notify the appellant of the offer to review the matter in question.

#### **25 49D Notifying appeal to the tribunal**

(1) This section applies if notice of appeal has been given to HMRC.

(2) The appellant may notify the appeal to the tribunal.

(3) If the appellant notifies the appeal to the tribunal, the tribunal is to decide the matter in question.

30 (4) Subsections (2) and (3) do not apply in a case where—

(a) HMRC have given a notification of their view of the matter in question under section 49B, or

(b) HMRC have given a notification under section 49C in relation to the matter in question.

(5) In a case falling within subsection (4)(a) or (b), the appellant may notify the appeal to the tribunal, but only if permitted to do so by section 49G or 49H.

#### **49E Nature of review etc**

5 (1) This section applies if HMRC are required by section 49B or 49C to review the matter in question.

(2) The nature and extent of the review are to be such as appear appropriate to HMRC in the circumstances.

(3) For the purpose of subsection (2), HMRC must, in particular, have regard to steps taken before the beginning of the review—

10 (a) by HMRC in deciding the matter in question, and

(b) by any person in seeking to resolve disagreement about the matter in question.

(4) The review must take account of any representations made by the appellant at a stage which gives HMRC a reasonable opportunity to consider them.

(5) The review may conclude that HMRC's view of the matter in question is to be—

15 (a) upheld,

(b) varied, or

(c) cancelled.

(6) HMRC must notify the appellant of the conclusions of the review and their reasoning within—

20 (a) the period of 45 days beginning with the relevant day, or

(b) such other period as may be agreed.

(7) In subsection (6) “relevant day” means—

(a) in a case where the appellant required the review, the day when HMRC notified the appellant of HMRC's view of the matter in question,

25 (b) in a case where HMRC offered the review, the day when HMRC received notification of the appellant's acceptance of the offer.

(8) Where HMRC are required to undertake a review but do not give notice of the conclusions within the time period specified in subsection (6), the review is to be treated as having concluded that HMRC's view of the matter in question (see sections 49B(2) and 30 49C(2)) is upheld.

(9) If subsection (8) applies, HMRC must notify the appellant of the conclusion which the review is treated as having reached.

#### **49F Effect of conclusions of review**

35 (1) This section applies if HMRC give notice of the conclusions of a review (see section 49E(6) and (9)).

(2) The conclusions are to be treated as if they were an agreement in writing under section 54(1) for the settlement of the matter in question.

(3) The appellant may not give notice under section 54(2) (desire to repudiate or resile from agreement) in a case where subsection (2) applies.

(4) Subsection (2) does not apply to the matter in question if, or to the extent that, the appellant notifies the appeal to the tribunal under section 49G.

**49G Notifying appeal to tribunal after review concluded**

(1) This section applies if—

5 (a) HMRC have given notice of the conclusions of a review in accordance with section 49E, or

(b) the period specified in section 49E(6) has ended and HMRC have not given notice of the conclusions of the review.

(2) The appellant may notify the appeal to the tribunal within the post-review period.

10 (3) If the post-review period has ended, the appellant may notify the appeal to the tribunal only if the tribunal gives permission.

(4) If the appellant notifies the appeal to the tribunal, the tribunal is to determine the matter in question.

(5) In this section “post-review period” means—

15 (a) in a case falling within subsection (1)(a), the period of 30 days beginning with the date of the document in which HMRC give notice of the conclusions of the review in accordance with section 49E(6), or

(b) in a case falling within subsection (1)(b), the period that—

(i) begins with the day following the last day of the period specified in section 49E(6), and

20 (ii) ends 30 days after the date of the document in which HMRC give notice of the conclusions of the review in accordance with section 49E(9).

...

**49I Interpretation of sections 49A to 49H**

(1) In sections 49A to 49H—

25 (a) “matter in question” means the matter to which an appeal relates;

(b) a reference to a notification is a reference to a notification in writing.

**FINANCE ACT 2009, SCHEDULE 56**

**Penalty for failure to pay tax**

30 **1—(1)** A penalty is payable by a person (“P”) where P fails to pay an amount of tax specified in column 3 of the Table below on or before the date specified in column 4.

(2) Paragraphs 3 to 8 set out—

(a) the circumstances in which a penalty is payable, and

(b) subject to paragraph 9, the amount of the penalty.

35 (3) If P’s failure falls within more than one provision of this Schedule, P is liable to a penalty under each of those provisions.

(4) In the following provisions of this Schedule, the “penalty date”, in relation to an amount of tax, means the date on which a penalty is first payable for failing to pay the amount (that is to say, the day after the date specified in or for the purposes of column 4 of the Table).

	Tax to which payment relates	Amount of tax payable	Date after which penalty is incurred
PRINCIPAL AMOUNTS			
2	Income tax	Amount payable under PAYE regulations ...	The date determined by or under PAYE regulations as the date by which the amount must be paid

...

**5—(1)** Paragraphs 6 to 8 apply in the case of a payment of tax falling within item 2 or 4 in the Table.

5 (2) But those paragraphs do not apply in the case of a payment mentioned in paragraph 3(1)(b) or (c).

**6—(1)** P is liable to a penalty, in relation to each tax, of an amount determined by reference to—

10 (a) the number of defaults that P has made during the tax year (see sub-paragraphs (2) and (3)), and

(b) the amount of that tax comprised in the total of those defaults (see sub-paragraphs (4) to (7)).

15 (2) For the purposes of this paragraph, P makes a default in relation to a tax year when P fails to make one of the following payments (or to pay an amount comprising two or more of those payments) in full on or before the date on which it becomes due and payable—

(a) a payment under PAYE regulations of tax payable in relation to the tax year;

(b) a payment of earnings-related contributions within the meaning of the Social Security (Contributions) Regulations 2001 (SI 2001/1004) payable in relation to the tax year;

20 (c) a payment due under the Income Tax (Construction Industry Scheme) Regulations 2005 (SI 2005/2045) payable in relation to the tax year;

(d) a repayment in respect of a student loan due under the Education (Student Loans) (Repayments) Regulations 2009 (SI 2009/470) or the Education (Student Loans) (Repayments) Regulations (Northern Ireland) 2000 (S.R. 2000 No 121).

25 (3) But the first failure during a tax year to make one of those payments (or to pay an amount comprising two or more of those payments) does not count as a default for that tax year.

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

30 (5) If P makes 4, 5 or 6 defaults during the tax year, the amount of the penalty is 2% of the amount of the tax comprised in the total 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 the tax comprised in the total 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 the tax comprised in the total of those defaults.

35 (8) For the purposes of this paragraph—

- (a) the amount of a tax comprised in a default is the amount of that tax comprised in the payment which P fails to make;
  - (b) a default counts for the purposes of sub-paragraphs (4) to (7) even if it is remedied before the end of the tax year.
- 5 (9) The Treasury may by order made by statutory instrument make such amendments to sub-paragraph (2) as they think fit in consequence of any amendment, revocation or re-enactment of the regulations mentioned in that sub-paragraph.

**Special reduction**

- 10 **9—(1)** If HMRC think it right because of special circumstances, they may reduce a 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.
- 15 (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.

**Assessment**

- 20 **11—(1)** Where P is liable for 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.
- 25 (2) A penalty under any paragraph of this Schedule must be paid before the end of the period of 30 days beginning with the day on which notice of the assessment of the penalty is issued.
- (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),
    - 30 (b) may be enforced as if it were an assessment to tax, and
    - (c) may be combined with an assessment to tax.

**Appeal**

- 13—(1)** P may appeal against a decision of HMRC that a penalty is payable by P.
- (2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P.
- 35 **14—(1)** An appeal under paragraph 13 is to be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or Upper Tribunal).
- (2) Sub-paragraph (1) does not apply (included in HMRC's bundle) —

(a) so as to require P to pay a penalty before an appeal against the assessment of the penalty is determined, or

(b) in respect of any other matter expressly provided for by this Act.

5 **15**—(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—

(a) affirm HMRC's decision, or

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

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

(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), 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.

15 (4) In sub-paragraph (3)(b) "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.

(5) In this paragraph "tribunal" means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 14(1)).

#### **Reasonable excuse**

20 **16**—(1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a payment if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.

(2) For the purposes of sub-paragraph (1)—

25 (a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control,

(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and

30 (c) 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 ceased.

### **INCOME TAX (PAY AS YOU EARN) REGULATIONS SI 2003/2682**

**69**—(1) An employer must pay amounts due under regulation 68(2)—

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

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

...

**219**—(1) For the purposes of the following provisions, if—

(a) any payment to the Inland Revenue is made by cheque, and

(b) the cheque is paid on its first presentation to the banker on whom it is drawn, the payment is treated as made on the day on which the cheque was received by the Inland Revenue.

(2) The provisions are—

Regulation 69

due date and receipts for payments of tax

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## **SOCIAL SECURITY (CONTRIBUTIONS) REGULATIONS 2001 (SI 2001/1004)**

### **67 Collection and recovery of earnings-related contributions, and Class 1B contributions**

10 (1) Subject to the provisions of regulations 68 and 70, earnings-related contributions and Class 1B contributions shall be paid, accounted for and recovered in like manner as income tax deducted from the general earnings from an office or employment by virtue of regulations under section 684 of ITEPA 2003 (PAYE Regulations).

15 (2) ...the provisions contained in Schedule 4, (which contains provisions derived from the Income Tax Acts and the PAYE Regulations with extensions and modifications) shall apply to and for the purposes of earnings-related contributions and Class 1B contributions.

#### **Schedule 4**

20 **10—**(1) ... the employer shall pay the amount specified in sub-paragraph (2) to the Inland Revenue within 14 days or, if payment is made by an approved method of electronic communications in respect of earnings paid after 5th April 2004, within 17 days of the end of every tax month.

...

(2) The amount specified in this sub-paragraph is the total amount of earnings-related contributions due in respect of general earnings paid by the employer in that ... tax month ...

**29—**(1) Sub-paragraph (2) applies for the purposes of paragraph...

25 (2) If any payment to the Inland Revenue is made by cheque, and the cheque is paid on its first presentation to the banker on whom it is drawn, the payment shall be treated as made on the day on which the cheque was received by the Inland Revenue, and “pay”, “paid”, “unpaid” and “overpaid” shall be construed accordingly.

#### **67A Penalty for failure to make payments on time: Class 1 contributions**

30 (1) Schedule 56 to the Finance Act 2009 (“Schedule 56 FA 2009”) (penalty for failure to make payments on time) shall apply in relation to the late payment of Class 1 contributions, as if—

(a) the Class 1 contributions were an amount of tax falling within item 2 of the Table in paragraph 1 of Schedule 56 FA 2009 (“the Table”),

35 (b) references to the PAYE Regulations were references to these Regulations, and

(c) ...”