



**TC04545**

**Appeal number: TC/2014/06746**

*Penalty - late payment of PAYE and NICs - FA 2009 Schedule 56 - whether a reasonable excuse for late payment - no - whether any special circumstances existed to justify a reduction in the penalty amount - no - application to bring a late appeal - appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**LUDDINGTON GOLF CLUB LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE MICHAEL CONNELL  
MEMBER LESLEY STALKER**

**Sitting in public at Fox Court, 14 Grays Inn Road, London, WC1X 8HN on 27 March 2015**

**The Appellant Company did not attend and was not represented**

**Ms Beverley Levy, Officer of HM Revenue and Customs for the Respondents**

## DECISION

### Decision under Appeal

- 5 1. This is an appeal by Luddington Golf Club Limited (“the Appellant”) against the £2,709.97 penalty imposed under Schedule 56 of the Finance Act 2009 (“Schedule 56”), in respect of the late payment by the Appellant of monthly payments of PAYE and National Insurance contributions (“NICs”) in nine months of the year ending 5 April 2012.
- 10 2. The amount and number of PAYE payments made late were not in dispute. However the Appellant’s appeal was not made within thirty days of the decision appealed against. The Appellant therefore applies for an extension of time in which to lodge its appeal.
- 15 3. If leave to appeal is granted, the issue is whether the Appellant had a reasonable excuse for the late payments.
- 20 4. The Appellant did not attend the hearing and was not represented. The hearing was listed for 10 am. Mr Gordon Melhuish, a Director of the Appellant, sent an e-mail (timed at 9.39 am on the morning of the hearing) saying that he was unable to attend due to illness and asking for an adjournment. HMRC objected to the application. The Tribunal was satisfied that the Appellant had been given sufficient notice of the time, date and venue of the hearing and after a preliminary review of the appeal, decided that it was in the interests of justice to proceed.

### The background facts

- 25 5. From 6 April 2010, a new penalty regime was introduced for late payment of monthly PAYE and NIC by employers. Penalties are imposed for late payment of PAYE under Schedule 56. The legislation in relevant part is set out below.
- 30 6. The penalties under Schedule 56 are based on a sliding scale as shown in the table below. The penalty varies as provided by paragraph 6, subparagraphs (4) to (7). 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.

No of failures	Penalty
1	no penalty providing the payment is less than six months late
2-3	1%
4-6	2%
7-9	3%
10 or more	4%

7. A penalty will not be levied if a) a time to pay agreement had been agreed in advance of the due date(s), b) if there are “special circumstances” in terms of

paragraph 9 Schedule 56 or c) if the Appellant can establish that there was a reasonable excuse for each or any default.

5 8. The Appellant was late in paying its monthly PAYE and NICs for eleven months of the 2011-12 tax year. Only nine months attract a penalty, for the reasons explained in paragraph 11 below.

9. HMRC produced for the hearing, a table showing the amounts of PAYE and NIC due for each of the relevant months, the number of days for each month, the date that payment was made for each of the months, and number that payment was late in each of the default months as set out in the table below.

PAYE and NIC not paid on time	Due Date	Days Late/final balance paid
£ 8,455.91	19.05.2011	16
£10,155.17	19.06.2011	0
£ 8,576.97	19.07.2011	17
£ 8,663.43	19.08.2011	18
£ 9,588.17	19.09.2011	12
£11,041.98	19.10.2011	20
£10,564.09	19.11.2011	63
£10,781.13	19.12.2011	64
£11,466.88	19.01.2012	61
£0	19.02.2012	
£0	19.03.2012	
TOTAL £89,293.73		

10

10. HMRC assessed a penalty at the 3% rate and notified it to the Appellant in a letter dated 13 August 2012. The Appellant appealed to the Tribunal on 16 December 2014.

15 11. A penalty was not charged for month 1 because the legislation allows the first default to be penalty free. (Paragraph 6(3) Schedule 56). The late payment for the month ended 5 April 2012 was excluded from the calculation following the decision of the First-tier Tribunal in *Agar Limited v HMRC* (TC 01625).

12. The Appellant submitted a letter of appeal (undated), received by HMRC on 31 August 2012 and provided a copy of its letter to RBS in which it claimed to have been substantially overcharged by the Bank, thereby causing an insufficiency of funds.

20 13. On 5 September 2012 HMRC asked the Appellant for more information and in particular answers to the following questions:

- a. How did the money which was incorrectly charged by the bank affect the Appellant's ability to pay its PAYE on time and what period did this cover?

- b. what measures were taken to ensure that the Appellant's PAYE payments were made?
- c. Which 2011-2012 PAYE tax months were affected?
- d. Did this affect the Appellant's ability to make other payments i.e. staff wages or other business liabilities?

5

14. On 21 September 2012 the Appellant replied, answering:

“a. Over two years ago (pre 2010), the bank moved our account to the Global Restructuring Dept. They shut down our small loans, removed our overdrafts and returned cheques unless there were cleared funds the day before. On our main loan, they put us in default and charged us an increased interest rate. We instructed solicitors and threatened to take them to court. They are now prepared to correct this. This however, caused us a major cash flow problem. On the main loan we had protection insurance i.e. a hedge fund, this operated in a cap and collar manner. Due to the interest rates being reduced to 2 %, they charged us an extra £9,500 per quarter for two years. This, they have informed us, will be rectified. However, we still have no date as to when. In all the bank owe us between £130k and £150k. The directors have not taken any bonus or expenses from the business for the last 4 years. They have in this time loaned the company as much money as they have.

10

15

b. We have paid PAYE on a cash flow basis or by personal loans from the directors.

20

c. The whole period of 2011/12 was affected by the cash flow problems.

d. We experienced one month which happened to be at Xmas time when the wages weren't paid until after the holidays. We are in arrears with our rent for three-quarters of a year, constantly chased by creditors and often put on stop by our suppliers.”

25

15. On 1 October 2012, HMRC wrote to the Appellant rejecting the Appellant's appeal on the basis that from the information provided, a reasonable excuse had not been shown for the late payment and that if the directors knew the company was going to have difficulty paying its PAYE on time, it should have contacted HMRC's Business Payment Support Service before the months fell due, and if a time to pay arrangement was agreed which the Appellant adhered to, penalties would not have been charged. HMRC said that they attempted to contact the Appellant throughout tax year 2011-12 about the default situation. Telephone calls were made on the 25 May 2011, 26 July 2011, 24 August 2011, 23 September 2011, and 25 October 2011, but it wasn't until 4 November 2011 that HMRC received a response.

30

16. Over eight months later, on 19 June 2013, Solicitors Mackrell Turner Garrett wrote to HMRC on the Appellant's behalf saying :

35

“The company's bank, National Westminster, had wrongly penalised the Appellant causing severe losses. Eventually on the 17 May 2013 the bank paid £46,988.73 compensation.

There is still a dispute with the bank regarding the cap and collar insurance which was wrongly set up by the bank and this is now subject to a claim brought by our clients to the Financial Services Authority which again should result in a refund of premiums in the region of £100,000.

5 During the whole of the problem period the company has been paying excessive rates and again this is subject to an appeal, which we have been dealing with. Professional advisors have been instructed and the appeal has been ongoing since 2011. Delays have occurred by problems in the Valuation Office and not by our clients and the appeal is still outstanding.”

10 17. On 13 August 2013, HMRC issued the conclusion of their review, upholding the penalties and advised the Appellant that if it did not accept the decision its next course of action was to appeal to Tribunal. The reasons given by HMRC for rejecting the appeal were that although the Appellant had difficulties with its bank, these started in 15 2009-10. By 2011-12 such difficulties were not unexpected or unforeseen and the directors should have organised their affairs so as to be able to pay on time. The Appellant had made payments on time in only seven of the months from January 2006 to July 2013. It had paid late 91 times - including 2012-13. The Appellant had nearly always paid late, in both good economic times and bad. This indicates that there was not a particular unexpected issue in the year to 5 April 2012.

20 18. On 31 August 2013 the Appellant wrote to HMRC asking for its case to be further reviewed, mainly reiterating its previous grounds of appeal.

19. On 10 September 2013 HMRC advised that they would not review the appeal and that if the Appellant still disagreed with the decision it had the option of appealing to the Tribunal.

25 20. Mr. Gordon Melhuish, a Director of the Appellant, lodged a late appeal with the Tribunal on 16 December 2014.

### **The legislation**

30 21. The relevant legislation is contained in Finance Act 2009, Schedule 56. Paragraph 1 of Schedule 56 states as follows:

“(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.

35 (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.

40

(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).”

5

22. The table lists numerous various categories of taxes of which those referred to in items 1 and 2 (as shown in the extract from the Table below) are relevant to this appeal.

	<i>Tax to which payment relates</i>	<i>Amount of tax payable</i>	<i>Date after which penalty is incurred</i>
<i>PRINCIPAL AMOUNTS</i>			
1	Income tax or capital gains tax	Amount payable under section 59B(3) or (4) of TMA 1970	The date falling 30 days after the date specified in section 59B(3) or (4) of TMA 1970 as the date by which the amount must be paid
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
3	Income tax	Amount shown in return under section 254(1) of FA 2004	The date falling 30 days after the date specified in section 254(5) of FA 2004 as the date by which the amount must be paid

23. Regulations 67A and 67B of the Social Security Contributions Regulations 2001 as amended provide that Schedule 56 applies also to Class 1 National Insurance contributions as if they were an amount of tax falling within item 2 of the above Table, and to Class 1A and Class 1B National Insurance contributions as if they were an amount of tax falling within item 3 of the above Table.

24. Paragraph 5 of Schedule 56 states that paragraphs 6 to 8 of Schedule 56 apply in the case of a payment of tax falling within item 2 or 4 in the Table.

25. Paragraph 6 of Schedule 56 states as follows:

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

(a) the number of defaults that P has made during the tax year (see subparagraphs (2) and (3)), and

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

(2) For the purposes of this paragraph, P makes a default 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;

(b) a payment of earnings-related contributions within the meaning of the Social Security (Contributions) Regulations 2001 (SI 2001/1004);

5

(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.

10

(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.

(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.

15

(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.

20

(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;

25

(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.

30

(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.”

26. Paragraph 9 of Schedule 56 allows HMRC to reduce a penalty if special circumstances exist. Paragraph 9 states as follows:

35

“(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--

40

(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.

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to--

45

(a) staying a penalty, and  
(b) agreeing a compromise in relation to proceedings for a penalty.”

27. Paragraph 10 of Schedule 56 states as follows:

“(1) This paragraph applies if--

- 5
- (a) P fails to pay an amount of tax when it becomes due and payable,
  - (b) P makes a request to HMRC that payment of the amount of tax be deferred, and
  - (c) HMRC agrees that payment of that amount may be deferred for a period (“the deferral period”!).
- 10
- (2) If P would (apart from this sub-paragraph) become liable, between the date on which P makes the request and the end of the deferral period, to a penalty under any paragraph of this Schedule for failing to pay that amount, P is not liable to that penalty.
- 15
- (3) But if--
- (a) P breaks the agreement (see sub-paragraph (4)), and
  - (b) HMRC serves on P a notice specifying any penalty to which P would become liable apart from sub-paragraph (2),
- P becomes liable, at the date of the notice, to that penalty.
- 20
- (4) P breaks an agreement if--
- (a) P fails to pay the amount of tax in question when the deferral period ends, or
  - (b) the deferral is subject to P complying with a condition (including a condition that part of the amount be paid during the deferral period) and P fails to comply with it.
- 25
- (5) If the agreement mentioned in sub-paragraph (1)(c) is varied at any time by a further agreement between P and HMRC, this paragraph applies from that time to the agreement as varied.”

28. Paragraph 11 states in mandatory terms that HMRC must levy a penalty where P is liable:

- 30
- “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
- 35 is assessed.”

29. Paragraphs 13-15 of Schedule 56 provide for appeals to the Tribunal against a decision of HMRC that a penalty is payable, or against a decision by HMRC as to the amount of the penalty that is payable. The Tribunal’s powers are laid down in paragraph 15:

- 40
- “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
- 45 power to make.

(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

5 (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.

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

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

30. As observed in *Dina Foods Limited*, [TC01546] under paragraph 15 the Tribunal is given power:

15 "to confirm or cancel the penalty, or substitute for HMRC's decision another decision, but only one that HMRC had the power to make. The Tribunal can only rely upon the "special circumstances" provision in paragraph 9 to a different extent than that applied by HMRC if it thinks that HMRC's decision in that respect was flawed. Applying judicial review principles, the Tribunal must consider whether HMRC acted in a way that no reasonable body of commissioners could have acted, or whether they

20 took into account some irrelevant matter or disregarded something to which they should have given weight. The Tribunal should also consider whether HMRC have erred on a point of law."

25 31. Under paragraph 16 of Schedule 56, the Appellant may escape liability for a penalty if the Tribunal is satisfied that there was a reasonable excuse. Paragraph 16 was amended by Schedule 11 of the Finance (No 3) Act 2010 (c,33). As originally drafted, paragraph 16 provided that liability to a penalty did not arise in relation to any failure for which there was a reasonable excuse. In the amended version, the paragraph also went on to say: "the failure does not count as a default for the purposes of

30 paragraph 6..." The effect of this change is therefore that under the amended legislation, it is clear that defaults for which there is a reasonable excuse are not to be counted when fixing the appropriate rate of penalty to be charged.

32. Paragraph 16 of Schedule 56 states as follows:

35 "(1) If P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for a failure to make a payment-

(a) liability to a penalty under any paragraph of this Schedule does not arise in relation to that failure, and

(b) the failure does not count as a default for the purposes of paragraph 6

40

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

(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
- (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.”

5

33. In considering a reasonable excuse the Tribunal examines the actions of the Appellant from the perspective of a prudent taxpayer exercising reasonable foresight and due diligence and having proper regard for its responsibilities under the Taxes Acts.

10

34. The operation of Schedule 56 was considered in *Dina Foods*. It was observed that:

“(1) the legislation became operative with a commencement date of 6 April 2010, so that the first time penalties could be raised under these rules was after the end of the 2010/11 tax year, given the way that the penalties talk in terms of the number of defaults during the year in question (at [11]);

15

(2) except in the case of special circumstances, the scheme laid down by the statute gives no discretion: the rate of penalty is simply driven by the number of PAYE late payments in the tax year by the employer (at [31]);

20

(3) the scheme of the PAYE legislation requires taxpayers to pay over PAYE on time; the legislation does not require HMRC to issue warnings to individual employers, though it would be expected that a responsible tax authority would issue general material about the new system (at [33]);

25

(4) lack of awareness of the penalty regime is not capable of constituting a special circumstance; in any event, 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 (at [37]);

30

(5) any failure on the part of HMRC to issue warnings to defaulting taxpayers, whether in respect of the imposition of penalties or the fact of late payment, is not of itself capable of amounting either to a reasonable excuse or special circumstances (given that there is no separate penalty for each individual default, and the penalty can only be assessed once the aggregate of the late paid tax comprised in the total of the defaults for a particular tax year has been ascertained) (at [38]-[39]).”

35

40

#### 45 **Appellant’s case**

35. The grounds of appeal as stated in the Appellant’s Notice of Appeal were that:

5 “i. I honestly believe that a genuine inability to pay the PAYE tax is a valid reason not to have any penalty imposed. The Appellant has continued operating its business during the most difficult trading conditions and despite their bank and Rating Authority having imposed unfair terms, which have been proved eventually to have been wrong, these difficulties have led the Appellant to be in arrears with payments of tax to HMRC who have issued a winding up petition against the Appellant. An agreement as to stage payments has been reached however.

ii. None of the directors have received any wages from the Appellant. Rent to the landlord has been delayed and so too, wages to the staff on two occasions.

10 iii. The directors have done their utmost to meet all payments due, including raising money from outside the business.

iv. All current payments to HMRC are being met and where there have been indisputable past delays in payment which have been readily acknowledged, they too are being met.”

15 36. With regard to the late appeal Mr Melhuish said that he was “the lead director of the Appellant Company” and that he “simply had insufficient time to deal with the appeal, with all the above problems to face”. Mr Melhuish referred to the grounds of appeal which had been referred to during the earlier exchange of correspondence in 2013:

20 i. In 2010, the bank moved the Appellant’s account to a Global Restructuring Department, which shut down small loans, removed overdrafts. This caused the Appellant major cash flow problems. PAYE was paid on a cash flow basis or by personal loans from the directors.

ii. The Directors have not taken any salary, bonus or expenses since 2009.

25 iii. The company has been paying excessive rates, which is subject to appeal and has been ongoing since 2011. Delays have been down to the Valuation Office.

iv. The Appellant has been in arrears with its rent with its landlord for 3/4 of the year and is constantly chased by creditors.

30 v. On two occasions, wages were not paid to staff on time.

vi. The Golf club suffered a difficult period due to adverse weather conditions.

35 vii. After litigation with the bank, it has now been established that it owes the Appellant between £130K and 150K. Once the bank has repaid them they will be able to meet all commitments.

### **HMRC’s case**

40 HMRC’s contentions with regard to the late appeal

37. Section 49 TMA 1970 states that for HMRC to agree to a late appeal, it must be in writing, give a reasonable excuse for being late, and be submitted without unreasonable delay after the excuse has ceased.

38. The appeal against the penalty should have been made within thirty days of the date of the review conclusion letter, that is, no later than 12 September 2013. The appeal was not lodged with the Tribunal until 14 December 2014.

5 39. HMRC contend that the Appellant does not have a reasonable excuse for appealing to the Tribunal over fifteen months late. They received the review conclusion letter on 20 August 2013. No valid reason has been given as to why they waited so long.

10 40. Time limits are there to be adhered to in order to maintain a fair system for all taxpayers. In the case of *Finchley United Services Club v HMRC* Judge McKenna says at paragraph 15:

“..... there is a public interest in the efficient conduct of litigation ... there would be considerable disruption to the Tribunal if applications were allowed to proceed out of time in the absence of good reasons being shown.....”

41. At paragraph 24 of *Leeds City Council v HMRC*, Judge Bishop states:

15 “...The aim of the rule, like any other imposing a time limit, is to require a party asserting a right to do so promptly, and to afford to his opponent the assurance that, after the limit has expired, no claim will be made.....”

20 42. Following both cases, HMRC’s submission is that the time limits exist to give finality in legal proceedings to both sides, and allow HMRC to move on to other cases - something that is in the wider public interest.

43. The 460 day delay in appealing to the Tribunal ran from 13 September 2013, 30 days after the review letter was issued on 13 August 2013 until 16 December 2014 when the appeal was made to the Tribunal service.

25 44. HMRC say that there was no valid explanation for this delay and the reason given, that the Appellant had insufficient time to deal with the appeal due to facing problems with their bank and rating department, is not accepted by HMRC as a reasonable excuse. The Appellant has not shown proper regard for the time limits imposed on them by legislation.

30 45. If leave is given to the Appellant to appeal out of time, this would be of prejudice to HMRC and it would be unfair to other taxpayers, who do adhere to the legislation by appealing within the thirty day time limit set by Parliament.

46. In the case of *Finchley Services Club v HMRC*, at paragraph 15 Judge McKenna said:

35 “We recognise that a decision to refuse the application to proceed out of time effectively shuts the Applicant out from litigation, so we have also considered the likelihood of the Applicant’s appeal succeeding if it were allowed to be made out of time...”

47. HMRC have in turn considered the likelihood of the Appellant's success in this appeal and submit that the treatment of their bank and rating department is an entirely different issue and cannot be considered an excuse for paying late.

5 48. Because the Appellant does not have a reasonable excuse for its persistent late  
payment, there would be no merit to hearing the substantive issue. The directors'  
excuse for paying late for nine months of the year is an inability to pay, which equates  
to an insufficiency of funds, which the legislation says is not a reasonable excuse  
unless attributable to events outside their control. The Appellant's difficulties with  
10 their bank were not new to the 2011-12 tax year but have been ongoing for over three  
years.

49. HMRC records show that the 2011-12 tax year was not the first year that PAYE  
payments were made late. Since 2005-06, which is long before the banking issues  
began, they have only ever made seven months PAYE payments on time.

HMRC's contentions against the substantive issue.

15 50. The Appellant does not have a reasonable excuse for the late payment.

51. If there is a reasonable excuse it must exist throughout the entire period of  
default. HMRC say that when deciding whether the Appellant has a reasonable excuse  
for failing to make payments in full and on time, it is necessary to consider whether  
the person has shown to have had proper regard for their responsibilities under the tax  
20 acts. If the person could reasonably have foreseen the event, whether or not it is  
within their control, HMRC expect the person to take steps to meet their statutory  
obligations.

52. The matter was looked at by Judge Medd in the case of *The Clean Car Company  
Ltd* when he states:

25 "The test of whether or not there is a reasonable excuse is an objective one. In my  
judgment it is an objective test in this sense. One must ask oneself:- was what the  
taxpayer did a reasonable thing for a responsible trader conscious of and intending to  
comply with his obligations regarding tax, but having the experience and other  
relevant attributes of the taxpayer and placed in the situation that the taxpayer found  
30 himself at the relevant time, a reasonable thing to do?"

53. The PAYE deducted from employees' salaries/wages rightly belongs to HMRC  
and if the directors decided to use this as a form of short-term finance on a regular  
basis and then they pay late they will as a consequence be subject to a penalty.  
Legislation at Regulation 69 Income Tax (PAYE) Regulations 2003 sets the dates by  
35 which the employer must make these payments and if paying by cheque the payments  
must be received in time to clear with HMRC by the 19th of the month. These dates  
are not negotiable, and therefore not open to interpretation and failure to do so makes  
them liable to a penalty under Schedule 56 FA 2009.

54. Employers who delay paying have an unfair advantage over other employers who adhere to their statutory obligation to pay on time. It is not enough to pay in full - it must also be on time, so that the defaulter does not gain any commercial advantage.

5 55. Although Mr Melhuish's assertion that a genuine inability to pay the PAYE tax is a valid reason not to have a penalty imposed, this is not correct, because Paragraph 16(2)(a) specifically excludes an insufficiency of funds as a reasonable excuse.

56. To cite the First-tier Tribunal case of TC2012/5761 *Thane Dispersions Ltd v HMRC* [2012] UKFTT 595 (TC), Judge Jennifer Blewitt considers cash flow at paragraph 16. She states:

10 "16. Whilst we were sympathetic to the cash flow difficulties suffered by the appellant, we noted that they had been ongoing for a substantial amount of time prior to the year which is subject of this appeal. Once such difficulties occurred, the onus was on the appellant to manage its affairs, for example by reaching a time to pay agreement with HMRC, in order to make the payments. At no time did the appellant  
15 make use of the facilities offered by HMRC to those experiencing such difficulties nor did the appellant contact HMRC prior to the due dates in order to explain the difficulties. Instead the appellant chose to make its payments late which, in our view, was not the way in which a reasonable person, seeking to adhere to his legal obligations, would act. In those circumstances, we found that any reasonable excuse  
20 which may have existed in respect of years prior to 2010/11 when the difficulties began was not remedied without unreasonable delay and therefore there was no reasonable excuse in respect of 2010/11."

57. HMRC records show that the Appellant has a long history of non-compliance and that the Appellant has continually paid late since 2005-06 when the business started.

25 58. The Appellant's earlier PAYE payment history has failed to show any evidence of unexpected or unforeseen events other than normal trading difficulties. There was nothing in the Appellant's history that would have prevented them from paying their PAYE by the due dates.

30 59. This demonstrates that the late payments have been ongoing for a considerable period of time, and does not just relate to 2011-12. The fact that the Appellant has consistently paid late over a number of years shows that there was no unusual event in 2011-12 that can be said to have led to the Appellant paying late, and that the reasons put forward cannot be considered as a reasonable excuse.

35 60. In the tax case of *Rodney Warren & Co v HMRC* UKFTT [2012] UKFTT 57 (TC) Judge Hellier stated at paragraph 42:

40 "Was there a reasonable excuse for any of the defaults? It was plain that the late payment of PAYE and NIC was part of the normal cash management of the appellant's business; but although cash flow management may be a reason for late payment, it cannot be an excuse within the meaning of paragraph 16 for what that paragraph describes as a 'failure'."

61. The Appellant discussed a Time to Pay arrangement in the 2011-12 PAYE year on only one occasion. This was during a 'phone conversation on 20 January 2012 which was after seven months payments had already been paid late. This could not be agreed at that time. Had the Appellant contacted HMRC and set up an arrangement before payments became due then no penalty would have been charged for that month, provided the agreement was adhered to. However, no further action was taken by the Appellant.

62. Cash flow difficulties are part of the hazards of trading rather than an underlying cause outside the control of the Appellant. The Appellant's cash flow problems are not beyond those expected in the course of business in difficult economic circumstances and these problems have evidently existed for some time. In this situation HMRC expects employers to take action to adjust their processes to enable them to pay by the due date. The Appellant says the directors have not received any salaries for four years, are late paying rent and have on occasions paid wages late, and yet they have chosen not to make any redundancies.

63. All businesses face hard choices but the business still has to be viable in order to pay its debts and make provisions to make PAYE payments to HMRC in full and on time, where possible by arranging short-term finance.

64. In *Rodney Warren & Co v HMRC*, Judge Hellier looked at earlier years to establish the employer's pattern of paying before he considered their excuse. Judge Hellier concluded, at paragraph 45:

"... 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. In this case that link did not seem to be present because in the previous year, when there had not been the additional delay in payment by the Legal Services Commission, the Appellant had been late in payment (although by not quite so many days). At least the initial few days of each later period were as the result of the policies developed in earlier years of paying late. The Legal Services Commission delays may have made the payment even later but they were not the reason for the failure."

65. What the Judge is saying is that an additional reason for late payment does not amount to a reasonable excuse, and does not absolve an employer from penalties if they were already paying late. Because the company paid late before the bank changed their account terms, it cannot be said to be the factor that made them pay late.

66. The directors knew they were going to encounter problems with their finances as early as 2009. In their letter of 31 August 2013 they said:

"Since 2009 the bank and the government have tried their best to put us out of business."

67. The directors clearly had enough time to deal with any changes before the 2011-12 payments were due and they were also in correspondence with the bank on this issue as far back as May 2010 and October 2010.

68. HMRC do not consider the Appellant's appeal with the Valuation Office, which has been ongoing since 2010, a reasonable excuse for failing to make PAYE payments on time in 2011-12.

5 69. In correspondence with HMRC the Appellant also said that inclement weather conditions had affected levels of business and its cash flow. However, as grounds of appeal the matter was not earnestly pursued and no evidence was provided to support its argument.

10 70. Although the Appellant has now ensured all current payments are being met and stage payments have been agreed to clear those which are in arrears, this does not excuse them from paying the legislated penalty for making PAYE payments late in 2011-12.

### **Conclusion**

71. As stated by Mr Justice Morgan in *Data Select Ltd*:

15 "33. As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) How long was the delay? (3) Is there a good explanation for the delay? (4) What will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time? The court or tribunal then makes its decision in the light of the answers to those questions."

20

72. The Court of Appeal held that, when considering an application for an extension of time for an appeal to the Court of Appeal, it will usually be helpful to consider the overriding objective in CPR r 1.1 and the checklist of matters set out in CPR r 3.9.

25 73. Time limits are generally to be adhered to unless good reason can be shown why they should be overridden. However, it is also necessary for the Tribunal to take into account the overriding objective of the 2009 Rules and actively exercise its discretion under Rule 5(3) of those Rules, for which purpose a balancing exercise must be conducted, taking into account all relevant circumstances and the factors set out above in *Data Select*, including the arguable merits of each party's case.

30 74. Generally the purpose of adherence to time limits is finality and certainty, which is necessary for HMRC to efficiently operate the taxation system. Time limits are also necessary for the efficient organisation of the Tribunal appeals system. Time bar provisions are intended to maintain the interests of the proper administration of justice.

35 75. The Notice of Appeal was not lodged until over twelve months after the decision. The Appellant has not offered any acceptable explanation for the delay other than that Mr Melhuish has been too busy with all the other problems.

76. The onus of proof is on the Appellant to demonstrate why the appeal should be heard out of time. With regard to the substantive issues, the onus of proof again rests,

under statute (Section 50(6) TMA 1970), with the Appellant to show that it has a reasonable excuse for the late payments, and one that is not specifically disallowed by the legislation.

5 77. The Appellant has not however offered any convincing grounds of appeal. Its substantive case is principally that it was suffering an insufficiency of funds. This is not however an acceptable ground of appeal unless the insufficiency of funds arose as a result of circumstances which were unforeseeable and outside its control. No evidence has been provided to support that conclusion. The merits of the appeal therefore do not support the grant of an extension of time within which to bring an  
10 appeal.

78. Generally, an extension of time is the exception rather than the rule. Having considered the explanation for the delays, in the overall context of the history of the matter and having taken into account all the factors set out above, with particular reference to the overriding objective and the merits of the appeal, we consider that  
15 this is not a case where we should exercise the Tribunal's discretion to permit the appeal to be made after the expiry of the relevant time limit.

79. The appeal is accordingly dismissed.

80. 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  
20 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.

25

**MICHAEL CONNELL  
TRIBUNAL JUDGE**

30

**RELEASE DATE: 22 JULY 2015**