



**TC03003**

**Appeal number: TC/2011/09162**

*PAYE – late filing penalty - whether reasonable excuse for making late payment – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**MODWOOD LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE DR K KHAN  
LESLIE HOWARD**

**Sitting in public at Bedford Square, London on 11 July 2013**

**The Appellant did not appear and was unrepresented**

**Gloria Orimoloye, HMRC Officer, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

1. The Appellants confirmed, through their advisors, Tiffin Green, Accountants, on 15 December 2011, that they were happy for the matter to be determined in their absence.

### Matter under appeal

2. This matter relates to the late payment of PAYE/NIC for the year ended 5 April 2011. A penalty of £10,551.07 (later revised to £6,944.26) was levied pursuant to Schedule 56 Finance Act 2009. The penalty was issued on 17 June 2001. An appeal was lodged on 30 June 2011.

3. The matter to be determined is whether the Appellant has a reasonable excuse for making the late payment of its monthly liabilities.

### 15 The Facts

(1) The Appellant paid 11 of their 12 monthly PAYE/NIC payments late.

(2) On 17 June 2011 HMRC issued the Appellant with a Penalty Determination for the year ended 5 April 2011 in the amount of £10,551.07.

20 (3) On 11 April 2012 the penalty was reduced to £6,944.26 (the month 12 penalty was removed following the AGAR decision). This resulted in the penalty percentage being reduced from 4% to 3% and the penalty was correspondently reduced.

(4) The Schedule of late payments is as shown on the table below.

Month	Tax & NIC due	Due date	Penalty trigger date	Date paid	Number of days late	Monthly penalty charged
1	£21,086.94	19/05/2010	20/05/2010	28/05/2010	0	£0.00
2	£27,784.93	19/06/2010	20/06/2010	30/06/2010	11	£833.55
3	£26,742.44	19/07/2010	20/06/2010	31/07/2010	12	£802.27
4	£24,642.44	19/08/2010	20/07/2010	28/08/2010	9	£739.27
5	£26,450.23	19/09/2010	20/09/2010	02/10/2010	13	£793.51
6	£26,334.00	19/10/2010	20/10/2010	30/10/2010	11	£790.02
7	£26,066.28	19/11/2010	20/11/2010	10/12/2010	21	£781.99
8	£27,618.96	19/12/2010	20/12/2010	06/01/2011	18	£828.57
9	£22,459.14	19/01/2011	20/01/2011	27/01/2011	8	£673.77
10	£23,377.09	19/02/2011	20/02/2011	02/03/2011	11	£701.30
11	NIL	19/03/2011	20/03/2011	03/03/2011	0	£0.00
12	£24,133.16	19/04/2011	20/04/2011	26/03/2011	0	£0.00
12	£28,314.42	19/04/2011	20/04/2011	07/05/2011	18	£849.43
Total	£305,010.03					£7,793.69
					Less: Month 12	
					<b>Total</b>	<b>£6,944.26</b>

## Evidence

4. The documentary evidence included:

- 5 (1) Correspondence between HMRC and the Appellant.
- (2) Notes of telephone conversation between HMRC and the Appellant for the relevant period.
- (3) Penalty Notices and PAYE late penalty calculations.
- 10 (4) HMRC legislation, employer bulletins, case law bundle and Respondents' skeleton argument.
- (5) Notice of appeal and extracts from HMRC documentation dealing with the penalty regime.

## The Law

15 5. Schedule 56 of the Finance Act 2009 provides for the computation and assessment of the penalty and allows for a penalty to be charged when an employer fails to pay HMRC their monthly PAYE/NIC payment by the due date.

20 6. Paragraph 6(1) of Schedule 56 states that an employer is liable to pay a penalty of an amount determined by reference to the number of defaults made during the tax year.

7. Paragraph 9 of Schedule 56 provides for HMRC to reduce the amount of the penalty if they think it right because of "special circumstances". "Special circumstances" does not include ability to pay.

25 8. Paragraph 16 of Schedule 56 provides that there is no liability to a penalty if the taxpayer had a "reasonable excuse" for a failure to make a payment. It provides:

30 "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; and

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

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

35 (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

40 (c) where P had a reasonable excuse for the failure but the excuse had 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."

## **Appellant's Submissions**

9. The Appellant makes the following submissions:

5 (1) On 16 February 2010 they wrote to HMRC as follows:

10 “We are advising you that due to having incurred a Company going into liquidation owing us monies to the sum of £100,000 and the downturn of work, we are experiencing cash flow problems, therefore we are notifying the Revenue that our payments will be made, but later than 19<sup>th</sup> of each month and hope you can accept the end of each month to help us at this difficult time.”

Their argument therefore is that they were experiencing cash flow difficulties and these were caused by reasons which were outside of their control.

15 (2) They stated in their Notice of Appeal that the penalty was “unreasonable, and not in anyone’s best interest”. They indicated that “time to pay arrangements” were not offered to them and they were operating in very “difficult economic times”.

20 (3) They explained that “over the past six years, both the company and directors have paid total tax in excess of £740,000, without giving HM Revenue & Customs any collection problems”.

## **Respondents' Submissions**

25 (1) HMRC say that the Appellant does not have a reasonable excuse for the late payment. Insufficiency of funds due to poor economic trading conditions does not constitute a reasonable excuse since this is a normal hazard of business. This is something that all businesses have to accept and adapt to. The withholding of tax and NIC payments to aid general cash flow is not a reasonable excuse for making late payments.

30 (2) They refute the Appellant’s contention that one of their customers went into liquidation owing £100,000. They make the following points:

- (i) The event occurred in 2009/10 and not in 2010/11.
- (ii) The event was not proximate enough to the defaults to be responsible for the payment failures.
- 35 (iii) The event did not cause the Appellant to pay late, because they had paid late in earlier years as well.
- (iv) The event was not “behaviour changing” in respect of the PAYE payments, because payments of PAYE had been paid late for many years.

40 (3) It is not a reasonable excuse that HMRC did not offer the Appellants a “time to pay” arrangement. The onus is on the Appellant to contact

HMRC to explain their financial position and to ask for some additional time to pay and to make the necessary arrangements.

- 5 (4) The Appellant paid their taxes late over a number of years and are simply making excuses for late payment and have not put forward any acceptable reasonable excuses for the late payments, the legislation requires this to be done for their appeal to succeed.

### Conclusion

10 10. The Tribunal's jurisdiction is restricted to a finding of whether there was a reasonable excuse for the late payment of tax. The Tribunal finds that the late payments were not the result of an insufficiency of funds attributable to events outside the Appellant's control. In consequence therefore the Appellant does not have a reasonable excuse for failing to make the payments on time.

15 11. The Tribunal notes the submissions of HMRC at a direction hearing on 12 July 2012, where Judge Perez asked the Appellant to provide evidence for their cash flow problems. In particular, they were asked with reference to a client company going into liquidation owing £100,000 to provide information on:

- (1) when the £100,000 was due to be paid;
- 20 (2) what proportion of the Appellant's overall cash flow did the £100,000 represent;
- (3) whether the company which failed to pay the £100,000 was the Appellant's biggest or only client;
- (4) how it was that the £100,000 non-payment prevented the Appellant from  
25 paying any PAYE payment on time; and
- (5) whether PAYE payment not paid on time was due to the £100,000 non-payment.

30 12. The Appellant did not provide information on these points. Their advisors, Tiffin Green, Accountants, provided handwritten notes to the questions but these answers were one word or short phrases which were not sufficiently complete to constitute full answers.

35 13. An insufficiency of funds is not a reasonable excuse unless it is attributable to events outside the taxpayer's control. In order for the insufficiency of funds provide an excuse to a taxpayer from a default there must be a causal link between the event and the default. In this case there appears to be no such a link and there is no evidence presented by the Appellants to show that one of their clients went into liquidation owing £100,000. Further the debt which is referred to seems to have arisen in previous years and does not relate to the year in which the penalty was imposed. It must be remembered that while HMRC has the onus to demonstrate that  
40 the payments were made late the onus then shifts to the Appellant in respect of the

appeal to prove that they had a reasonable excuse. There is no dispute that the payment were made late but the Appellants have not discharged the burden placed on them to show that they had a reasonable excuse for the late payment at the time those payment were made.

5 14. It is not an excuse that there is an insufficiency of funds due to generally  
difficult economic climate. The Appellants were able over the previous six years to  
pay in excess of £740,000 in tax liabilities. This would not suggest a company which  
has financial problems. There is no evidence that the company was in financial  
difficulties. It had not, for example, undergone a reorganisation, made staff  
10 redundant, increased its overdraft facilities or taken any similar action which would  
be commensurate with financial problems and difficult economic conditions.

15 15. HMRC made the point that the Appellant regularly paid late both in good  
economics times and in bad so the late payment in 2010/11 was not an unexpected  
event giving rise to a reasonable excuse. The Appellants simply continued with their  
normal pattern of paying late. The Tribunal is content to accept the view of HMRC  
that by consistently paying late over a number of years there was no unusual event in  
2010/11 that can be said to have been caused by the company's cash flow difficulties.

20 16. The Appellants contend that they were not offered "time to pay" arrangements  
but there is no evidence that they contacted the Business Payment Support Service  
before the PAYE became due. If the Appellants had made contact and entered into an  
agreement at the appropriate time then the penalties would not have been charged for  
late payment of PAYE. At no point did the Appellant officially ask for a "time to  
payment" arrangement and there is no evidence that any such request was made to  
HMRC within the appropriate time. A "time to pay" arrangement is a concession that  
25 would have been granted by HMRC with strict terms and condition. It requires an  
official arrangement to have been made and an agreement that there would be no  
payments for a certain period. This would have meant that there would have been no  
penalties for the relevant period of the arrangement. It is unfortunate that these  
arrangements were not made..

30 17. If the Appellant did have a substantial client who went into liquidation and they  
provided the information requested by Judge Perez at the direction hearing with  
supporting documentation and details, it is possible that the Appellant would have had  
a reasonable excuse. It is more likely however that given the Appellant has  
continually paid late by between 4 and 10 days, there is a pattern of lateness in  
35 making monthly payments which is unrelated to the economic conditions or adverse  
trading.

18. In the circumstances therefore the appeal is dismissed since the Appellant has  
not discharged the burden placed upon them and there is no reasonable excuse.

40 19. 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.

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**DR K KHAN  
TRIBUNAL JUDGE**

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**RELEASE DATE: 25 October 2013**