



**TC02926**

**Appeal number: TC/2013/02304**

*PAYE – Penalty for late payments; whether reasonable excuse – no; appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**RED BUILDING PROJECTS LIMITED**

**Appellant**

**- and -**

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

**TRIBUNAL:    PRESIDING MEMBER: PETER R SHEPPARD FCIS,  
FCIB, CTA, ATII  
MEMBER: SCOTT A RAE LLB,WS**

**Sitting in public at George House, Edinburgh on 23 August 2013**

**Mrs Jo Simpson for the Appellant**

**Mrs Linda McGuigan, Officer of HMRC, for the Respondents**

## DECISION

### Introduction

1. As a preliminary matter HMRC's letter of 5 November 2012 advising the  
5 conclusions of their review gave the appellant 30 days to lodge an appeal against their  
decision with the First-tier Tax Tribunal. The appellant submits that it sent an appeal  
in December 2012 but this was not received by the Tribunal. A replacement notice of  
appeal dated 27 March 2013 was received by the Tribunal. In the circumstances and  
10 in the absence of any objection from Mrs McIntyre for HMRC the Tribunal proceeded  
to hear the substantive appeal.

2. This concerns an appeal to the Tribunal dated 27 March 2013 made by the  
appellant against a penalty initially assessed by HMRC in the amount of £6,289.64  
but later reduced by them to £6,109.53. The penalty was for late payments of PAYE  
for the tax year 2011-12.

### 15 Statutory Framework

3. The Finance Act 2009 Schedule 56 provides for penalties to be determined for  
late payments of PAYE.

### Case law

*Algarve Granite Ltd v HMRC* [2012] UKFTT 463 (TC)

### 20 Facts

4. The appellant is a small building firm operating in Edinburgh and the  
surrounding area. Over recent years it has managed to train up seven apprentices who  
have now qualified.

### Appellant's submissions

25 5. On 9 October 2012 the appellant considers it had agreed a time to pay  
arrangement with HMRC which covered all outstanding debt.

6. HMRC's Taxpayer Designatory Data has the following entry on 9 October  
2012.

30 "C6055582 09/10/12 15.21 No returns outstanding. No other HMRC debts. TP has no  
repayments due. TP has no previous TTP requests. Unable to PIF due to lack of work.  
TP has tried the following- approaching bank. Assets available – none. Action taken  
to ensure pymts met – upturn in business."

7. On 10 October HMRC sent a penalty determination notice to the appellant.

8. On 26 October 2012 Mrs Jo Simpson, Finance Director, for the appellant wrote to HMRC appealing against their decision to charge the penalties at that time in the amount of £6,289.64 for the late payment of PAYE for 2011/2012. The letter states

5 “Whilst I accept we were extremely late on paying these and at the year end were outstanding a substantial balance I would like to appeal against the penalties.

9. As a small building business between 2009-2012 we were affected badly by not only the recession but by two horrific winters where work on building sites had to stop. We made the decision to keep all staff employed and to continue to try and trade as best we could. Unfortunately we got behind with our PAYE payments.

10 10. We have worked really hard to keep up to date with 2012-2013 and just negotiated a time to pay arrangement for 2011-2012’s outstanding balance. Whilst we fully accept that interest charges are and will continue to be applied the penalties of £6,289.64 would have a major impact on the running of our business and I was not aware of these at the time I made the arrangement.”

15 11. HMRC replied to that appeal in a letter dated 5 November 2012 to the appellant. They said that they could not accept that the appellant’s reasons for late payment constituted a reasonable excuse.

20 12. The appellant appealed this decision to the First-tier Tribunal. In their notice of appeal dated 27 March 2013 the appellant repeats the points made in their letter to HMRC dated 26 October 2012.

25 13. At the hearing Mrs Simpson gave more details of the company’s business and the difficulties they had faced during the bad winter of 2011/12 including some employees who resided outside of Edinburgh being trapped at home for a few days when roads were impassable. She candidly accepted that the appellants had been naïve in planning for winter work. She said that the appellant had managed to pay wages and pay sub-contractors on time but obligations to make PAYE payments on time had not been kept to. She criticised HMRC for agreeing time to pay arrangements and then sending a penalty notice only days later.

### **Respondent’s submissions**

30 14. Mrs McGuigan for HMRC referred to a ‘PAYE late penalty calculation, in the bundle of documents provided to the Tribunal. This detailed incidences of late payments by the appellant in the tax year 2011-2012.

35 15. In that period the appellant made 10 or more late payments so in accordance with Paragraph 6 of Schedule 56 of the Finance Act 2009 the penalty is levied at a rate of 4% of the tax paid late which was £108,844.28. The penalty is therefore £4,353.77. In addition where amounts have been outstanding for more than six months, Paragraph 7 of Schedule 56 provides that an additional penalty of 5% is chargeable. The amount outstanding for more than six months was £35,115.27 so the additional penalty is £1,755.76. The total of the two penalties is therefore £6,109.53

16. The original penalty of £6,289.64 had been calculated by HMRC. In reviewing the papers ahead of the hearing HMRC noticed that the payment application should be revised with the result that the penalty was reduced to £6,109.53

5 17. Mrs McGuigan submitted that HMRC had considered whether the appellant had reasonable excuse for the late payments as contemplated by Paragraph 16 of Schedule 56 of the Finance Act 2009. HMRC had concluded that they did not. Paragraph 16(2)(a) provides:

“an insufficiency of funds is not a reasonable excuse unless attributable to events outside P’s control.” P having been defined earlier in the legislation as “a person”.

10 18. In their letter of 5 November 2012 to the appellant HMRC pointed to numerous communications they had made to the appellant in the form of penalty articles and warnings contained in Employer Bulletins. They had also sent a specific warning letter after the first failure to pay on time and had made telephone calls to the appellant.

15 19. In respect of the appellant’s argument that the general economic downturn might constitute a reasonable excuse, Mrs McGuigan drew attention to paragraphs 34 and 35 of the First-tier Tribunal’s decision in *Algarve Granite Ltd v HMRC* [2012] UKFTT 463 (TC) which considered that the downturn is “the consequences of normal trading, albeit in adverse economic conditions”. In their Statement of Case HMRC  
20 state that “The global recession can be regarded as starting in 2007 and by 2011-2012 cannot be regarded as an unforeseen event”.

20. Mrs McGuigan referred to page 10 paragraph 39 and onwards of the First-tier Tribunal decision in the case of *Algarve Granite Ltd*. She said that HMRC did consider whether they should apply the Special Reduction rule as provided by  
25 Paragraph 9 of Schedule 56 of the Finance Act 2009 but had decided not to do so.

## Decision

21. The Tribunal finds that HMRC’s actions in assessing a penalty only a few days after the appellant thought it had agreed a time to pay arrangement for all outstanding debts is poor. Whilst it is clear that the penalty was due and the appellant should have  
30 realised this, it is also clear that by omitting to mention it when the time to pay arrangements were being entered into, HMRC misled the appellant. It is no argument to say that the penalty did not hit their system until 26 October 2012 as the penalty had been incurred by 23 April 2012, so HMRC could have levied it at any time since then if they had chosen to. The effect of this omission was that the appellant then  
35 worked out a budget/cashflow for the months ahead having thought it had agreed a time to pay arrangement for all outstanding tax. Unexpectedly it then had to budget for an additional £6,109.53, a not inconsiderable sum for a small business. Whilst the Tribunal is critical of HMRC in omitting to mention the penalty when time to pay arrangements were being made, this occurred after the period in question and at a time  
40 when payments had already been made late and therefore cannot be regarded as a reasonable excuse for the late payments.

22. The Tribunal considered whether or not the appellant had reasonable excuse for the failure to make PAYE payments on time in 2011/2012 tax year. It is true that the severe weather conditions in the winter of 2011/2012 were events outside of the appellant's control but such weather conditions are not unusual in winter in Scotland.  
5 The appellant should have made adequate provisions to allow for that possibility such as by scheduling indoor projects for the winter months which the appellant accepted they had to some extent failed to do.

23. The penalty of £6,109.53 for the period 2011-12 that has been assessed by HMRC has been correctly calculated as set out in paragraph 13 above. The appellant  
10 does not dispute that the payments had been made late and has established no reasonable excuse for their late submission. Whilst in the unfortunate circumstances of this case the Tribunal has some sympathy for the appellant the legislation makes it clear that the Tribunal has to dismiss this appeal.

24. The documents show that HMRC did consider whether they should apply the  
15 Special Reduction rule as provided by Paragraph 9 of Schedule 56 of the Finance Act 2009 but had decided not to do so and whilst sympathetic to the position in which the appellant found themselves in the light of the subsequent (to them) unexpected demand for penalty, the Tribunal, in all the circumstances of the case and in the light  
20 of the statutory provisions imposing the penalty regime, could not regard the HMRC decision to charge penalty as sufficiently "flawed", within the provisions of para 15 of Schedule 56, as to merit substituting an alternative decision.

25. 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  
25 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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**PETER R SHEPPARD  
PRESIDING MEMBER**

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**RELEASE DATE: 27 September 2013**