



**TC03798**

**Appeal number: TC/2013/07176**

*INCOME TAX – late payment of PAYE – penalties under Schedule 56 Finance Act 2009 – financial difficulties of taxpayer– whether reasonable excuse – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**3R ENTERPRISES LTD**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE NICHOLAS ALEKSANDER  
MR JOHN DAVISON**

**Sitting in public at Bedford Square, London on 8 January 2014**

**R Puri, Managing Director of the Appellant for the Appellant**

**P Reeve, an officer of HM Revenue and Customs, for the Respondents**

## DECISION

### Introduction

1. This is an appeal against penalties of £9,278.95 assessed under Schedule 56 Finance Act 2009 in respect of late payment of PAYE for the tax year 2011/12.

2. Mr Puri, the Appellant's Managing Director, represented the Appellant ("3R"), and Mr Reeve represented HMRC. In addition to the evidence of Mr Puri, we also had before us a bundle of documentary evidence.

3. The Tribunal originally released a summary decision. The Appellant has requested that the Tribunal provide full written findings and reasons with a view to seeking permission to appeal. This is the Tribunal's decision with full written findings and reasons. The attention of the parties is drawn to the fact that appeals lie to the Upper Tribunal on points of law only, and that findings of fact by the Tribunal are generally not appealable. Any application for permission to appeal must set out the issue of law in respect of which permission to appeal is sought.

### The statutory provisions

4. The statutory provisions relating to late payments of tax are contained in Schedule 56 to the Finance Act 2009. The relevant paragraph of the Schedule, applying to late payments of PAYE, is paragraph 6, which reads as follows:

(1) P [the taxpayer] 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 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)).

(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);

(c) a payment due under the Income Tax (Construction Industry Scheme) Regulations 2005 (SI 2005/2045);

(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 (SR 2000 No 121).

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.

(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.

10 (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.

15 (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.

(8) For the purposes of this paragraph—

20 (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.

25 (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.

5. It can be seen from paragraph 6(7) that ten or more defaults in the tax year renders a taxpayer such as 3R liable to a penalty of 4% of the total amount of tax comprised in those defaults.

30 6. Schedule 56 also contains provisions (paragraph 16) removing liability for a penalty where there is a "reasonable excuse" for the failure, as follows:

(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—

35 (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 paragraphs 6, 8B, 8C, 8G and 8H.]

(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.

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### **The facts**

10 7. We find the background facts to be as follows.

8. 3R supplies garments to retail chains.

9. For 2011/12 it is not disputed that every installment payment of PAYE made by 3R was received by HMRC after the due date for payment.

15 10. Mr Puri gave evidence of the financial difficulties that the business faced. First, the overall economic climate in 2011/12 was very challenging, and a number of 3R's customers became insolvent, leaving outstanding debts owing to 3R. Second, many customers changed their terms of business to the financial detriment of 3R, and because of the bargaining strength of these customers, 3R had little choice but to accept these revised business terms. Finally, 3R's bank reduced the amount of their overdraft facility.  
20 During the 2011 trading year, the business's turnover decreased from £5.8 million to £4.9 million.

25 11. Mr Puri also told us about the procedures adopted for posting the PAYE cheque each month to HMRC, and submitted that the cheques were posted each month in good time for them to reach HMRC by the due date, but the reason for the delay was delays by Royal Mail.

### **Discussion**

12. We have considered the arguments put forward by Mr Puri above but consider that none of the points raised constitute a "reasonable excuse" for the purposes of paragraph 16 of Schedule 56.

30 13. It was not disputed by Mr Puri that 3R had been late in making payments of PAYE. The question for the Tribunal was whether it had a reasonable excuse for its defaults.

35 14. First, Mr Puri submitted that 3R had posted the payments in sufficient time to reach HMRC by the due date, but the lateness was caused by postal delays. We noted that there was no documentary evidence to support Mr Puri's oral evidence (such as postal receipts or a post book). We also note that HMRC's records show that there has been a history of

late payments of PAYE by the business in prior years. We find that Mr Puri's evidence of posting was not credible. Whilst we might have accepted that an occasional return might be delayed in the post, it was not credible that all twelve had been so delayed. We therefore find that the payments had not been posted in sufficient time to reach HMRC by the due date.

15. Second, Mr Puri referred to 3R's financial difficulties, and in particular the insolvencies of customers (in particular the insolvency of River Island, a major customer), the changes in purchase terms by customers and the reduction by its bank in the overdraft limit.

16. Although insufficiency of cash cannot be a reasonable excuse, the underlying reasons for the insufficiency might be. In particular, the financial difficulties in which 3R found itself cannot amount to a reasonable excuse unless attributable to events outside 3R's control. We have no doubt that in the general economic downturn, trading conditions for 3R became more difficult. These are, however, the consequences of normal trading, albeit in adverse economic conditions. As Lord Donaldson MR said in *Customs and Excise Commissioners v Steptoe* [1992] STC 757 at 770:

...if the exercise of reasonable foresight and of due diligence and a proper regard for the fact that the tax would become due on a particular date would not have avoided the insufficiency of funds which led to the default, then the taxpayer may well have a reasonable excuse for non-payment, but that excuse will be exhausted by the date on which such foresight, diligence and regard would have overcome the insufficiency of funds.

17. We do not accept that there was a reasonable excuse in this case. First, the insolvency of River Island did not occur in the PAYE year under appeal and the other insolvencies mentioned by Mr Puri were for amounts (ranging in amount from £33,000 to £800), and would not have prevented payment of PAYE by the due date. The reduction in the overdraft might have constituted a reasonable excuse, but the evidence was that the reduction did not occur in the period under appeal.

18. In this case, we consider that 3R did not exercise reasonable foresight nor did it display a proper regard for the date on which its PAYE was due and payable. We also note that 3R had had a history of persistent defaults, and also that it was now paying PAYE on time, notwithstanding more challenging financial circumstances.

19. For these reasons we do not consider that 3R had a reasonable excuse for its defaults. We have also considered whether the circumstances justify a special reduction, but find that there is nothing to suggest that this is appropriate.

20. If 3R found itself in financial difficulties because of the general economic climate, it was open to it to agree a "time to pay" arrangement with HMRC. Payments of tax made after their due date – but in accordance with a time to pay arrangement - do not attract penalties providing that the arrangement is concluded before the tax falls due, and

providing the taxpayer keeps to the agreed arrangement. We note that 3R had not agreed any time to pay arrangement with HMRC.

21. For these reasons, we find that 3R did not have a reasonable excuse for its failure to make its PAYE payments on time.

5 22. We therefore dismiss this appeal.

23. 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  
10 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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**NICHOLAS ALEKSANDER  
TRIBUNAL JUDGE**

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**RELEASE DATE: 9 July 2014**