[2015] UKFTT 0537 (TC)

TC04691

Appeal number: TC/2015/04013

Penalties for late payment of PAYE and NICs- Schedule 56 FA 2009- whether alleged illegal action by public authorities or a mistake by HMRC constituted reasonable excuse or special circumstances- appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

BROMCOM COMPUTERS PLC **Appellant**

- and -

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

TRIBUNAL: JUDGE SARAH FALK
LESLEY STALKER

Sitting in public at Fox Court, Brooke Street London EC1N 7RS on 13 October 2015

Mr Ali Guryel, Managing Director of the Appellant, for the Appellant

Mr Jeremy Taylor and Mr Neil Nagle, Officers of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal against penalties imposed under paragraphs 6 and 7 of Schedule 56 FA 2009 for late payment of monthly amounts due in respect of PAYE and Class 1 national insurance contributions for the tax year 2011-12, and under paragraph 3 of Schedule 56 for late payment of Class 1A national insurance contributions payable after the end of the same tax year. The appellant contends that it had a reasonable excuse for the failures. We have also considered HMRC's conclusion that there were no special circumstances justifying a reduction in the penalties in dispute.

Preliminary issue- late appeal

2. The penalties were originally assessed in September 2012. The appeal to HMRC was made in January 2015 and was accepted by them as a late appeal. The appeal resulted in a downwards adjustment of the monthly payment penalties which was confirmed by an HMRC review which concluded on 16 April 2015. The appellant appealed against the conclusions of the review but the appeal only reached the Tribunal on 26 June 2015, after the 30 day deadline under s 49G Taxes Management Act 1970 ("TMA").

3. In these circumstances the appeal can only proceed with the Tribunal's permission under s 49 TMA. HMRC did not object to the Tribunal granting permission, and we gave it. We note the appellant's explanation that the delay was caused by confusion over the correct address for the appeal, which was originally sent to an HMRC office within the time limit. We accept that this was a bona fide mistake.

The penalties in dispute

4. The original penalty determination referred to late payments for months 1, 4, 5 and 7 to 11 inclusive. Month 12 was also late (and indeed may still be unpaid) but since the default did not fall during the tax year it was disregarded, see *Agar Limited v HMRC* [2011] UKFTT 773 (TC). The month 1 default did not count under paragraph 6(3) of Schedule 56. This left seven monthly defaults, resulting in a penalty of 3% under the version of the legislation in force at the time. Five of these, months 1 and 7 to 10, were over six months late, leading to an additional penalty of 5% in respect of those under paragraph 7 of Schedule 56. (Relevant extracts of the legislation are set out below.)

5. Following the appeal HMRC removed the penalty for month 1 on the basis that a time to pay arrangement was in place, and the penalty for month 11 "as a gesture of goodwill" given difficulties associated with the winding up petition described below. Before us this was explained as an application of the power to reduce penalties for

special circumstances, although at the time HMRC maintained that there were no such circumstances.

6. This left five monthly defaults (months 5 and 7 to 10 inclusive), with the default for month 4 now disregarded. These were as follows:

Month	**Tax period ended**	**Amount due/paid late (£)**
5	5 September 2011	23,630.05
7	5 November 2011	24,107.77
8	5 December 2011	28,130.88
9	5 January 2012	30,964.13
10	5 February 2012	19,510.29

The original due dates for payment for the five months in question were 17 days after each period end, since the appellant used an electronic payment method: regulation 69 Income Tax (PAYE) Regulations 2003 and regulation 67 Social Security (Contributions) Regulations 2001 ("SSCR").

7. Following the reduction the initial penalty rate became 2% rather than 3% and four months (months 7 to 10) were subject to the additional 5% penalty. The total 2% penalty was £2,526.86 and the 5% penalty was £5,135.65.

8. There was also a 5% penalty charged for late payment of Class 1A national insurance. The amount overdue was £4,446.36 and the penalty was £222.31. Although we received no submissions on this we have proceeded on the basis that this amount would have been payable on 22 July 2012 under regulation 71 SSCR.

9. The total penalty charged following the appeal to HMRC was £7,884.82, reduced from the original amount of £12,458.73.

Evidence

10. We reviewed documentary evidence provided by both parties, comprising correspondence between them, notes produced by HMRC from their records (including some records of telephone conversations), and documentation relating to the alleged action by local authorities described below and the winding up petition against the appellant which was issued during the period in question. Mr Ali Guryel, managing director of the appellant, presented the case for the appellant and gave oral evidence. It was clear that Mr Guryel had been heavily involved in the management

of the appellant throughout the period and remained so, and had a detailed knowledge of the issues it faced.

Findings of fact

The business and role of local authorities

11. The appellant is a software company, mainly involved in developing and supplying software for school management (Management Information Systems or MIS). The company's initial success in the 1990s related to a wireless based electronic attendance system. In 2001 it won a Queen's award for innovation.

12. From 2000 onwards the appellant invested in the development of advanced software incorporating cloud technology. However over the same period the appellant became increasingly adversely affected by the dominance of one provider, Capita Business Services Limited. The appellant eventually concluded that it was suffering from what it considered were unlawful procurement practices by the main customers, local authorities, who were allowing contracts with Capita to roll over rather than going out to tender. The appellant's complaints contributed to a 2010 report by the British Educational Communications & Technology Agency (BECTA) which concluded that around 80% of local authorities might not be complying with procurement law in this area.

13. Following the report a nationwide procurement framework was put in place and the appellant was one of the companies approved as a supplier under the framework in March 2012.

14. Despite this and despite a reminder circular issued to local authorities by the Department for Education in September 2012, problems have continued. Legal action has been taken against some local authorities and a further complaint was made in late 2014 to the Competition and Markets Authority.

Knowsley Council

15. Knowsley Council was a local authority customer of the appellant. In 2008-09 Knowsley decided to switch to another supplier for schools converting to academy status. By some time in 2010 the appellant discovered that the other supplier had failed to deliver and that the schools were continuing to use the appellant's software without permission. Legal action was commenced by the appellant in late 2010 or early 2011 claiming payment for use of the software against invoices that the appellant had by then raised.

16. The appellant believed that it had a strong case but, for whatever reason, the Council did not settle quickly. It first looked like a settlement might be possible in August 2011 but it was only in December 2011, fairly shortly before the trial date set for February 2012, that the Council agreed to a without prejudice conference call. A settlement was not agreed on the call but the appellant was left hopeful that their proposals would be accepted. However, the Council's solicitor was then taken ill and

this delayed matters. Settlement was finally agreed just before the hearing and the agreed amount was paid on 17 February 2012.

Cash flow difficulties

17. It is clear that from at least 2010-11 the appellant was suffering from cash flow difficulties, and indeed that these remain. The appellant attributes these to (a) the alleged continued failure by local authorities to comply with procurement law and (b) specific difficulties with Knowsley Council, associated with the consequences of the winding up petition referred to below. We accept that the failure to put contracts out to tender did have an impact on the appellant's revenue.

18. Although we were not provided with full details, it appears that the appellant failed on a number of occasions to pay PAYE, national insurance and VAT due during 2010-11. Initially a time to pay arrangement was in place, and was extended to cover month 1 of 2011-12, but it was then terminated by HMRC. The notes on HMRC's system indicate that in HMRC's view the arrangement had been broken by the appellant, who had indicated that money had been spent on commissioning research into other projects rather than paying HMRC. The notes indicate that in these circumstances the arrangement should not have been extended, and the matter was being referred for enforcement action.

19. In August 2011 HMRC lodged a winding up petition against the appellant, referring to a total amount outstanding of £342,210.55, around half of which related to PAYE and national insurance due for 2010-11 and month 1 of 2011-12, and the remainder related to VAT for periods 03/11 and 06/11. Although HMRC refused further time to pay it did agree to delay advertising the petition until two weeks before a hearing of the petition on 23 January 2012.

20. By this stage part of the petition debt had been paid off and the amount outstanding was £216,288.70. The amount claimed by the appellant from Knowsley Council was £206,817.63. The appellant attempted to persuade HMRC to delay advertising the petition further in view of what it believed to be an imminent settlement, and provided a solicitor's undertaking that the amount received would be paid direct to HMRC. However, HMRC refused to agree any further delay and the petition was advertised in January 2012. This led to the appellant's bank accounts being frozen, although it seems that this did not entirely preclude creditors being paid by special arrangement, and the business did continue to operate.

21. The winding up petition was due to be heard again on 19 March 2012. When Knowsley Council finally paid on 17 February the proceeds of that, plus must what have been an additional top up amount from the appellant, paid off the balance of HMRC's petition debt in full. HMRC had previously confirmed on 13 February that if this happened they would seek dismissal of the petition at the next hearing. At that time the HMRC debt manager handling the correspondence also volunteered that they had not been notified of any supporting creditors (meaning creditors who wished to join in the petition rather than agree to its dismissal). A further letter dated 29

February confirmed that payment had been received and also said that the writer was not aware of any supporting creditors.

22. The appellant continued to make enquiries of HMRC as to whether any supporting creditors had been notified, including by telephone on the morning of Friday 16 March. The HMRC officer reconfirmed that she was not aware of any. However, later in the morning the officer called back to say that she had been told by HMRC's Solicitors Office that there were two supporting creditors, for £9,000 and £45,000 respectively. It transpired that the Solicitors Office were notified of both these supporting creditors during January. The Solicitors Office subsequently explained to the appellant that the lack of communication which resulted in incorrect information being provided arose because the appellant was dealing with the debt management unit in Worthing rather than, as is apparently more usual for enquiries about supporting creditors, the Solicitors Office direct. For the future the Solicitors Office would send details to Worthing on receipt so that their systems should reflect the information.

23. In the short time available before the petition was due to be heard on the following Monday the appellant was unable to deal with either creditor. As a result the petition was not dismissed as anticipated on 19 March, but only some five weeks later on 24 April. Furthermore, whilst dealing with the first supporting creditor (a straightforward trade debt) was not a major issue, the second one was genuinely disputed and the appellant did not consider that any amount was due. The appellant ended up having to pay £60,000 to the second creditor in order to secure a speedy dismissal of the petition.

24. The issue of whether there were supporting creditors was clearly a significant one for the appellant. Mr Guryel explained that after the winding up petition had been advertised in January matters became difficult for the business, including in relation to staff. However, the directors continued to believe that the business was viable and were confident that the appellant would be included in the procurement framework due to be awarded in March (see [13] above] As far as the banks were concerned (Lloyds and Santander) the appellant managed to keep their confidence in the business by assuring them that the petition would be dismissed on 19 March. When this did not occur they lost confidence, and this had a real impact on the business.

25. We are prepared to accept Mr Guryel's evidence that, if the appellant had known that two creditors were supporting the petition when HMRC became aware of that, it would have had time to deal with the problem before 19 March, by paying off one and putting evidence together to show that the other was genuinely disputed and should not provide a basis to continue with the petition.

Refinancing

26. Between around Summer 2011 and March 2012 the appellant had been in discussion with Santander about a proposed £500,000 refinancing. Mr Guryel explained that while the winding up petition existed (from August 2011) it would not have been possible to finalise this, but if it had been dismissed as expected then the

refinancing would have become available. However, in the event Santander lost confidence and refused to proceed. This caused further problems, including that the appellant was not able to take full advantage of the new procurement framework by marketing to local authorities.

27. In response to questions, Mr Guryel indicated in his oral evidence that the latest the Santander financing would have become available absent the winding up petition was March 2012, implying that it might have been available earlier to fund the late monthly payments that are the subject of this appeal. However, whilst this may have been a possibility we are not persuaded that the appellant has demonstrated that the financing would have been forthcoming earlier. Mr Guryel had previously stated in correspondence with HMRC that Santander had been attracted by the appellant's role as a supplier under the procurement framework. That role was only awarded in March 2012. In addition we saw a copy of an email from the contact at Santander dated as late as 27 March 2012 stating "I have now finished your application and had an initial discussion with our credit partner". We also note that financing was finally refused on 15 May, and that at that point Santander gave two other reasons in addition to the winding up petition for refusing finance (returned amounts and a county court judgement), and whilst we accept Mr Guryel's evidence that both those points were subsidiary and could have been addressed, the timeframe for that is unclear.

Late payments the subject of this appeal

28. We accept Mr Guryel's evidence that the appellant actively communicated with HMRC in relation to the amounts that were the subject of the petition debt, including trying to ensure that they agreed further delays in the process to allow time for a settlement with Knowsley to be reached, and arranging for the settlement amount to be paid direct to HMRC. However, HMRC have no record of any specific approach being made about the payments the subject of this appeal in advance of the due dates, apart from one phone call on 16 February recorded against month 9 in HMRC's systems (month 9 was due on 22 January). The note on file indicates that the appellant's agent called and discussed the possibility of a time to pay agreement. HMRC indicated that they would not look favourably on this because of previous arrears in the petition and concerns about solvency and compliance. Anything they agreed would need to be very short term. However, it seems that no time to pay proposal was received at that time. It also appears that there was no explanation about the proposed refinancing from Santander, if that was intended to fund the amounts in question.

29. A further note indicates that different advisers to the appellant (Baker Tilly) also contacted HMRC on 23 March and requested a time to pay arrangement to clear the balance. At this point all the monthly payments the subject of this appeal had become due. After some discussion HMRC refused the proposal subsequently put by Baker Tilly on the basis that the petition was still in place (which HMRC were now once again minded to support), at nine months the proposed time to pay arrangement was over too long a period, and the appellant's previous payment and compliance history was poor.

Continued arrears and financial problems

30. The appellant's financial problems continue. We were shown details of a further time to pay arrangement entered into with HMRC in February 2014, covering around £300,000 in total. This includes the late payment penalties the subject of this appeal. We understand that the arrears have not yet been fully cleared, including around £34,000 for the year 2011-12. We were also shown a very recent refusal of financing from another bank on the basis that HMRC arrears remain.

Legislation

31. Paragraph 1(1) Schedule 56 FA 2009 provides that a penalty is payable by a person, "P", where P "fails to pay an amount of tax" specified in the table set out in that paragraph "on or before the date specified" in the table. Item 2 in the table is income tax due under PAYE, which by virtue of regulation 67A SSCR includes Class 1 national insurance contributions.

32. Paragraph 5 provides (with some irrelevant exceptions) that paragraphs 6 to 8 apply to tax falling within item 2 of the table. The version of paragraph 6 in force for 2011-12 provided so far as relevant:

> "(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 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);
>
> …
>
> (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) …
>
> (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.

…

(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.

…"

33. Paragraph 7 provides:

"If any amount of tax is unpaid after the end of the period of 6 months beginning with the penalty date, P is liable to a penalty of 5% of that amount"

34. Paragraph 3, which is applied to Class 1A contributions by regulation 67B SSCR, imposes a 5% penalty for failure to pay on the due date.

35. Paragraph 16 provides (so far as concerns the penalties in question):

"(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 paragraphs 6…

(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."

36. Paragraph 9 also provides:

"(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.

(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."

37. Paragraph 13(1) gives a right of appeal against HMRC's decision to charge a penalty and paragraph 13(2) gives a right of appeal against the amount. Paragraph 15 states:

> "(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.
>
> (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.
>
> (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..."

Submissions

38. The appellant submitted that continued illegal action by local authorities over many years (which continued even after the BECTA report in 2010), the issue with Knowsley Council relating to unauthorised use of software and the delay in Knowsley settling the claim, together with the problems caused by the winding up petition that were significantly compounded by the Solicitors Office mistake, amounted to exceptional circumstances that meant that the appellant had a reasonable excuse. It was extraordinary that publicly accountable local authorities should act as they had. HMRC should have given the appellant more time and not pressed ahead with the winding up petition, particularly when the appellant was close to settling with Knowsley. The Solicitors Office error was extremely serious for the company and resulted in significant cost and damage, including the need to pay a significant amount to a disputed creditor and importantly the loss of the Santander financing and therefore the ability to exploit the new procurement framework. The effects were still being felt in the business.

39. HMRC argued that there was no reasonable excuse. The appellant had made no proper provision to make the payments in question. As far as Knowsley was concerned, the Council had terminated its contract and any amount later received was effectively a bonus which the appellant could not have expected when the contract

was terminated. The appellant was effectively using payments due to HMRC as financing for its business and not acting with a proper regard to its tax responsibilities. The appellant's earlier compliance history for 2010-11 also demonstrated this. Where, as here, a taxpayer defaults on a time to pay arrangement HMRC's policy on whether to grant or extend one becomes stricter and requires special reasons. The penalties were proportionate and intended as a deterrent, and the appellant had been warned about the penalty regime.

40. HMRC had considered whether there were special circumstances, including as part of the internal review and had concluded that there were none, although as described at [5] above the decision to remove the penalty for month 11 (due on 22 March) was explained at the hearing as due to special circumstances, namely the late notification by HMRC of the existence of supporting creditors at around that time.

Discussion

41. As a preliminary point we should make clear that, as explained by the Upper Tribunal in *Hok v HMRC* [2012] UKUT 363, we have no jurisdiction to discharge penalties on the basis that they may be perceived as unfair. For penalties that are otherwise validly imposed it is necessary for one or more of the specific relieving provisions in Schedule 56 to apply. The two potentially relevant provisions here are the reasonable excuse defence in paragraph 16 and the special circumstances provision in paragraph 9.

Reasonable excuse

42. As an initial point, it is worth clarifying that the test of reasonable excuse looks at whether there is a reasonable excuse for a failure to make a payment. It is clear from this that there must be a causal link between the excuse and the failure, and therefore that the excuse must predate the failure.

43. In considering whether the appellant had a reasonable excuse the Tribunal also needs to consider the actions of the appellant from the perspective of a taxpayer exercising reasonable foresight and due diligence and having proper regard for its responsibilities under the tax legislation. This is the test laid down by Lord Donaldson MR 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."

44. It is worth pointing out at this stage that, although Scott LJ expressed the view in the same case that an insufficiency of funds must result from an "unforeseeable or inescapable" event, he dissented and Lord Donaldson MR, who was in the majority, specifically disagreed with that view. It was therefore incorrect for HMRC to argue as

they did in this case that it was necessary to show that the cause of the insufficiency was unforeseeable.

45. HMRC relied on the frequently cited statement of Judge Medd QC in the case of *The Clean Car Company Ltd v The Commissioners of Customs & Excise* [1991] VATTR 234 when he stated:

> "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 himself at the relevant time, a reasonable thing to do?"

46. A key point is that the test of reasonable excuse is applied by reference to a hypothetical trader with attributes similar to the actual taxpayer, but with proper regard to its responsibilities to pay tax.

47. Paragraph 16 of Schedule 56 acknowledges that an insufficiency of funds can provide a reasonable excuse, but only if it is attributable to events outside the appellant's control (paragraph 16(2)(a)). It is therefore clear that the underlying causes of any insufficiency of funds must be considered. This is obvious from paragraph 16(2) and is also clear from the *Steptoe* case.

48. The appellant produced no specific evidence to demonstrate its inability to pay the amounts due on the due dates. Although it is clear that the appellant had cash flow difficulties it is apparent that it continued to trade throughout the period and that at least some other creditors, including staff, were being paid. The fact that HMRC was and apparently remains the major unpaid creditor also suggests that the appellant was selective in deciding which creditors to pay.

49. Whilst we accept that the appellant's cash flow difficulties were contributed to by local authorities failing to open contracts up to tender, it is very clear that these problems were of a long term nature, starting well before 2010. The winding petition may well have caused or at least contributed to payment problems during 2011-12 but that petition was itself triggered by substantial defaults during 2010-11 and a breach of a time to pay agreement. The problems with local authorities were of long standing and we are not satisfied that the appellant was unable to adjust its business model to take account of the problems as it might be expected to have done if it had paid sufficient attention to its tax responsibilities. We also do not think that a responsible trader would assume that such long term problems, and the appellant's cash flow difficulties, would disappear immediately after the BECTA report was issued in 2010. At the very least it would take some time for local authorities to arrange and conduct tender processes, award contracts and start paying under them, even if the appellant was right to be confident that it would be successful in obtaining a good proportion of the contracts. We cannot see that the fact that local authorities may have acted illegally can itself provide a reasonable excuse unless it caused an inability to pay that could not have been avoided with reasonable foresight: *Steptoe*, above.

50. We also do not accept that the difficulties with Knowsley Council provide a reasonable excuse. We agree with HMRC that any funds generated from the dispute would initially have been an unexpected bonus. We can see how the appellant may have become increasingly reliant on receiving the funds as a settlement approached, but it seems that was not in prospect before summer 2011 at the earliest. By that stage the arrears that triggered the winding up petition already existed, and the petition was itself lodged around that time. In addition, if Knowsley had paid at an earlier stage there is no suggestion that the funds available would have allowed payment of the amounts in dispute, rather than earlier arrears.

51. The appellant sought to demonstrate a link between Knowsley's action and the payment delays that triggered the penalties in dispute by arguing that if Knowsley had paid when it should the winding up petition would have been avoided. We note that the appellant did not demonstrate that the winding up petition itself resulted in a failure to make each of the relevant payments. The payments for months 5, 7 and 8 all became due before the petition was advertised. But more fundamentally it is necessary to look at the underlying cause of the winding up petition, which was the longer term cash flow difficulties referred to above and the failure to pay amounts due to HMRC for 2010-11, at a time when a payment from Knowsley was not clearly in prospect. A winding up petition issued for failure to make tax payments due for a previous year cannot itself amount to a reasonable excuse for failure to make payments in the current year unless the underlying reasons for the situation that has arisen amount to a reasonable excuse for the failure to make the payments now in question. Otherwise any enforcement action could provide an excuse for non-payment of later amounts, whatever the reason for the original non-payment. That cannot be right.

52. We also do not accept that the difficulty caused by the Solicitors Office failing to notify the existence of supporting creditors provides a reasonable excuse for the failure to make the monthly payments in question. That mistake post-dated the due dates for all of those payments. We have also not been persuaded that the financing from Santander that might have become available absent this mistake would have been available in time to make the payments on their due dates (see [27] above). Whilst we accept Mr Guryel's contention that the appellant might have tried to pursue this financing earlier had it not been for the winding up petition (and if the winding up petition had not been taken forward there would not have been a problem with supporting creditors), even if it would have obtained the financing earlier absent the winding up petition this would effectively amount to saying that the petition or the cash flow problems that led to that were the underlying cause of the failure to pay. As already discussed, we do not think that those circumstances in themselves amount to a reasonable excuse.

53. We considered whether the position was any different in relation to the 5% penalty under paragraph 7 Schedule 56 for months 7 to 10 on the basis that this arose because the amounts were outstanding for six months, and by that time the issue with the Solicitors Office had come to light, dismissal of the winding up petition had been delayed and the Santander financing refused. Under paragraph 16 there must be a reasonable excuse for the failure to make the payment. This wording links back to

paragraph 1, which refers to a penalty for failure to pay on the date specified: in other words there must be a reasonable excuse for the failure referred to in that paragraph. This is also reflected in the wording of paragraph 6 but not paragraph 7 which simply provides for an additional penalty if the amount is unpaid after six months. It seems to us that the correct interpretation is that if there is no reasonable excuse on the due date then later events cannot create one. This is also consistent with paragraph 16(2)(c) which contemplates that a reasonable excuse may cease to exist, but provides that P can be treated as continuing to have the excuse if the failure is remedied without unreasonable delay. Whilst not entirely clear the implication of this appears to be that if the failure is not remedied without unreasonable delay then the defence of reasonable excuse is not available at all, since no provision is made for penalties to be scaled back or charged on a pro rata basis under paragraph 16: they are either chargeable or not. The converse situation where there is no reasonable excuse initially is not contemplated.

54. Even if this interpretation is not correct we have concluded that the difficulties with the Solicitors Office were not the underlying cause of the failure to make the payments. That was ultimately attributable to the earlier payment defaults that led to the winding up petition, and which also led to Santander's refusal of financing.

55. This last point also applies to the Class 1A contributions due in July 2012, and on that basis we have concluded that the defence of reasonable excuse is not available in respect of any of the penalties.

Special reduction- special circumstances

56. We accept that HMRC considered whether special circumstances exist when they considered the taxpayer's appeal and we also note that the Tribunal's jurisdiction in relation to this is limited under paragraph 15(3). We agree with other recent First-tier Tribunal decisions that the failure to consider special circumstances before the penalties were first imposed does not render the decision flawed, see in particular *Bluu Solutions v HMRC* [2015] UKFTT 95 (TC).

57. We think it was correct for HMRC to accept that the difficulties caused by the Solicitors Office could be taken into account in relation to month 11 and that this was effectively the basis on which the penalty for that month was cancelled. It is also clear that, although HMRC did not give reasons for otherwise concluding there were no special circumstances (a point which will often itself result in a decision being treated as flawed- see *White v HMRC* [2012] UKFTT 364 (TC)), they did so as part of considering and responding to full submissions from the appellant which set out the circumstances considered in this appeal, both initially and again as part of their internal review.

58. In the circumstances we do not think we should substitute a different decision under paragraph 15(3)(b). In particular:

(1) Ability to pay cannot amount to special circumstances- paragraph 9(2)(a). It is clear from the scheme of the legislation that ability to pay is to be

considered under paragraph 16 only, where it is expressly addressed. Although not expressly stated we think it must also be the case that the underlying causes of an inability to pay must also be considered only under paragraph 16, since otherwise there would be a conflict between the two provisions. (This contrasts with the approach in the *Steptoe* case where a provision stating that insufficiency of funds was not a reasonable excuse was taken not to prevent an enquiry into whether the underlying causes for the insufficiency amounted to a reasonable excuse, effectively on the basis that Parliament cannot have intended otherwise: here paragraph 16 clearly allows such an enquiry.) The arguments raised by the appellant in relation to local authority behaviour, Knowsley Council and the circumstances resulting in the winding petition all fall into this category.

(2) This leaves the difficulties arising from the issue with the Solicitors Office. The meaning of "special circumstances" has been considered in a number of cases to mean something out of the ordinary, abnormal, exceptional or unusual- see for example *Clarks of Hove Ltd v Bakers' Union* [1978] 1WLR 1207, *Crabtree v Hinchcliffe* [1972] AC 707. We can see that this description could apply to the late notification of supporting creditors and the immediate problems to which that gave rise. However, it is also clear that the special circumstances must relate to the issue in question, here the defaults: see for example the *Clarks* case at page 1215. The fact that the appellant may have suffered as a result of an HMRC mistake cannot therefore amount to special circumstances in relation to defaults that had already occurred prior to March 2012. Whilst we can see that a different approach might be taken to the Class 1A amount due in July 2012, we do not think that HMRC's decision not to reduce or remove this penalty is so unreasonable as to be regarded as flawed in a judicial review sense, meaning that it was so unreasonable that no reasonable authority would have reached it (*Associated Provincial Picture Houses Ltd v Wednesbury* [1948] 1 KB 223). HMRC had clearly considered the matter and removed the penalty for month 11, and it seems to us to be within the bounds of reasonable decision making not to go beyond that.

Conclusion

59. The appeal is dismissed and HMRC's decision to impose a total penalty of £7,884.82 is affirmed.

60. We should note that there was a brief discussion at the hearing about the possibility of the appellant pursuing a complaint about HMRC's conduct in relation to failure to notify supporting creditors, ultimately to the Adjudicator's Office. It appears that this process has already commenced but at present the complaint has not been answered by HMRC. We explained that this was a separate matter from this appeal. Mr Taylor offered to explain this further to the appellant, for which we are grateful.

61. 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.

SARAH FALK

TRIBUNAL JUDGE
RELEASE DATE: 28 OCTOBER 2015