



**TC02376**

**Appeal number: TC/12/00524**

*Penalties – PAYE payments – whether made late – whether “reasonable excuse” or “special circumstances” – No – Finance Act 2009, Schedule 56 – Appeal refused*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**WALLACE CAMERON & CO LTD**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE KENNETH MURE, QC  
HELEN DUNN, LLB**

**Sitting in public at Wellington House, 134-136 Wellington Street, Glasgow on  
Friday 19 October 2012**

**Mr Palmer, Director, for the Appellant**

**Ms Chris Cowan, instructed by the General Counsel and Solicitor to HM  
Revenue and Customs, for the Respondents**

## DECISION

### Introduction

- 5 1. This is an appeal against Penalties totalling £25,296.61 in respect of late payments of PAYE liabilities by the Appellant company for the Year 2010/11. HMRC's calculation was revised to take account of the decision in *Agar* (TC/2011/4404910), which directs that the final payment falling due on 19 April 2011 should be ignored.
- 10 2. The issues in the appeal were, firstly, whether four particular payments viz nos 4, 5, 7 and 10 due respectively on 19 August, 19 September and 19 November 2010 and 19 February 2011, had been paid timeously (see Appellant's letter of 14 September 2011, page 11 of the Bundle), and in any event whether there was a *reasonable excuse* for the delay or *special circumstances* arising in the context  
15 of Schedule 56, Finance Act 2009 paras 16 and 9 respectively.

### Submissions

3. Ms Cowan helpfully set out the relevant law at the outset of the hearing. She referred us to Section 69 of the Income Tax (PAYE) 2003 Regulations, which provides that monthly payments of PAYE for the Fiscal Year should be made by the  
20 19<sup>th</sup> of the following month (except where made electronically, when the deadline is the 22<sup>nd</sup> – in the present appeal the controversial payments were not made electronically.) In the event of late payment penalties arise under FA 2009 Schedule 56, paras 5-8. The first late payment is ignored but subsequent failures trigger a penalty. Late payments are not cured even if settled before the end of the tax  
25 Year. Ms Cowan referred also to HMRC's guidance, which advises that when payments fall due at the weekend, payment has to be made on the Friday preceding (p58). This regime was widely publicised, and in this particular case HMRC had issued several demands and warning letters to the Appellant company in the course of the Year.
- 30 4. The only factual issue in dispute was the payment dates for the fourth, fifth, seventh and tenth payments. Mr Palmer, currently the financial director of the Appellant company, noted the dates of the relevant cheques (p42, 44, 46 and 52) as being before the due date of the 19<sup>th</sup> of the particular month. He had not worked for the Appellant company at that time and hence could not speak to its system for  
35 delivering cheques to HMRC. He argued that there was no logic in the company being only a day or two late in making payment: in the event of a cash-flow financial difficulty, a longer period of delay would be more likely. Further, he questioned the efficiency of HMRC's processing cheques at about the material date, viz the 19<sup>th</sup> of each month. It was unlikely, he argued, that HMRC could process all such cheques  
40 received on the 19<sup>th</sup> on the same day. Short delays of a day or two were inevitable, for which taxpayers such as his company should not be responsible.

5. In reply Ms Cowan submitted that the *onus* of proving timeous payment rested on the taxpayer and the mere date shown on the cheque was inconclusive. Her

understanding was that cheques on receipt were processed immediately by HMRC. There was no reason to delay. She submitted that the Tribunal should rely on HMRC's processing records as being accurate. She observed also that HMRC's Business Payment Support Service had been widely advertised and could have  
5 assisted the Appellant company by negotiating a "time to pay" agreement.

6. Mr Palmer argued in any event that a *reasonable excuse* in the sense required arose *et separatim* there were *special circumstances* affecting his company's trading circumstances which would justify a reduction of the penalty. He explained (and this did not seem to be disputed) that his company was part of a loss-making group,  
10 dependent on the financial support of its bankers, and private capital injections from its owners. The imposition of the penalty in full could result in the company's closure.

7. In reply Ms Cowan argued that in terms of the legislation cash-flow problems were not ordinarily a *reasonable excuse* (see para 16(2)(a)) and that an inability to pay did not specifically represent *special circumstances* which might justify a reduction in  
15 a penalty. Something specific, unforeseen and related to the particular taxpayer was required to meet these tests, she submitted. Factors affecting businesses generally were not sufficient. There were no uncommon or exceptional factors arising in the present appeal.

## 20 **Conclusion**

8. The first question for us to resolve is whether the four disputed payments were in fact made timeously. If they were, then the number of failures is seven, which would reduce the penalty rate to 3% and that on a reduced total. However, the preponderance of the evidence is that these four payments were not made in time.  
25 The date of the cheque does not obviously establish the date of delivery to HMRC: it simply precludes presentation for payment before that date. There was no evidence led about the Appellant company's mechanisms for payment at the relevant dates. Mr Palmer joined the company subsequently and was unaware of his predecessors' practices, except that he believed that cheques were posted. There is a logical force in  
30 Ms Cowan's argument that it was in HMRC's interests to cash the cheques immediately, and we are inclined to accept the accuracy of its records. Further, as the Tribunal noted, it seemed curious that the cheque dated (Friday) 18 March 2011 (p54), had it been received on that date, would not have been processed by HMRC until the following Thursday, ie 24 March 2011. We find, therefore, that these four  
35 payments were in fact made late.

9. The next aspect is whether there was a *reasonable excuse* for late payment. We were not addressed in relation to the failures at their respective dates individually – which, we consider, to be the proper approach – but rather on them together in the context of the company's continuing trading difficulties. While the adverse trading  
40 circumstances affecting the Appellant company did not seem to be disputed, no exceptional factor, peculiar to the Appellant company and its pattern of business, was mentioned. Adverse economic conditions affecting business activity generally would not suffice. We consider that interpretation consistent with para 16(2)(a).

10. Finally, we do not consider that *special circumstances* for the purposes of para 9 arise, which might justify a reduction of the penalty. The legislation does not appear to require such factors to be present at any particular stage, whether date of payment or date of the hearing. However, it is clear that the concept does not extend to “ability to pay” (see para 9(2)(a) and the commentary at paras 36 and 37 in Dina Foods Limited (TC/01546). With regret, therefore, it would be inappropriate for us to take into account the present financial and trading circumstances of the Appellant company.

11. For these reasons we refuse this Appeal and confirm the Penalties imposed.

12. 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.

**KENNETH MURE, QC**  
**TRIBUNAL JUDGE**

**RELEASE DATE: 19 November 2012**