



**TC02377**

**Appeal number: TC/12/00558**

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

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**SHEARER CANDLES LIMITED**

**Appellant**

**- and -**

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

**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 Ian Barnet, Director, for the Appellant**

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

## DECISION

### Preliminary

1. This appeal relates to penalties of £2,730.72 imposed by HMRC, the Respondents, on the Appellant company for late payment of its PAYE liabilities for the Year 2010/2011. Helpfully HMRC produced a table of the payments due, showing the individual amounts and delays in payment. As adjusted, and in view of the decision in *Agar* (TC/2011/04910), these total £2,730.72. *Agar* permits late payment for the final month, payable after the end of the Year in question, to be ignored. This calculation and the delays in payment were not disputed by the taxpayer. As the appeal proceeded, the issue between the Parties was whether the taxpayer company had a “reasonable excuse” (as defined) for the delay. The facts otherwise did not seem to be in dispute, although in instances there was a difference of opinion between Parties over what inferences might reasonably be drawn from them.

### Submissions

2. Ms Cowan introduced matters by setting out the relevant legislation contained in Schedule 56 Finance Act 2009. This is applicable from April 2010. In particular a default results even if payment of the tax due is made before the end of the Year (para 6(8)(c)). Ms Cowan explained that it was the practice of HMRC to check whether “time to pay” arrangements had been concluded with the particular taxpayer and whether there had been any contact with him before proceeding to impose a Penalty. She referred also to para 56 in which the term “reasonable excuse” is defined. Ms Cowan did not consider that that arose in the present case. She then noted the Grounds of Appeal, none of which, she submitted, satisfied the criteria. It was significant, she commented, that the company had “time to pay” arrangements in respect of VAT and Corporation Tax. Mr Barnett, therefore, was familiar with this system which could have been of assistance in the present case. She noted also a series of “default” letters and telephone calls issued to the company, warning it of the imposition of penalties. This correspondence was sent as a service to the taxpayer, not as a requirement. Ms Cowan referred also to para 9 which permits reduction of a penalty in “special circumstances”. She did not consider that these arose either in the present case. There was a *proportionality* in the penalty provisions. This struck at the lateness of the payment, not any ultimate default, and varied according to the number and amount of individual failures.

3. Mr Barnett’s submissions on behalf of his company were essentially that there was a “reasonable excuse” for the delay in payment in respect of each instalment of PAYE due. Each monthly failure was not addressed individually. He stressed that the PAYE liabilities, as all other tax liabilities of the company, had been settled. He founded on the general financial climate prevailing at the material time, delays in payment by the company’s major customer, and the dismissal of his financial controller, a CA. He addressed these aspects in turn, and thereafter Ms Cowan responded to them.

4. The adverse financial climate had affected the company's banking and overdraft arrangements. Its bankers, The Royal Bank of Scotland, had halved its overdraft limit. Arrangements for financial accommodation were then negotiated with the Clydesdale Bank. However, on closer scrutiny, it appears that the RBS's action took  
5 place in 2008, considerably before the critical period of April 2010 to March 2011. That interval seemed to question there being any causative effect.

5. Sainsburys apparently purchased 50% of the company's products. Mr Barnet produced cash control statements showing invoices issued by his company to Sainsburys and relative dates of payment. There are delays of three and even four  
10 months recorded in certain instances, but the invoices were paid in full and in other cases paid in full very promptly. Mr Barnet conceded that Sainsburys' payment system could be rapid if programmed by its suppliers carefully. In the circumstances there did not appear to be a regular systemic delay in making payment and, of course, it was not claimed that any invoices remained unpaid.

6. While the company's financial controller was dismissed (for reasons unrelated to the delayed PAYE contributions) during the relevant period (she was suspended in the Autumn of 2010), it seems that there were two other accounts assistants, both  
15 working full-time, who were able to deal with all aspects of the PAYE system together with assistance from Mr Barnet himself, who took over some of the duties of financial control pending a successor being appointed.  
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7. Ms Cowan considered that in view of the *contra* arguments a "reasonable excuse" for late payment did not emerge. Default letters had been sent by HMRC throughout the relevant period, yet the delays in payment continued. While Mr Barnet had used HMRC "time to pay" arrangements in relation to VAT and  
25 Corporation Tax, he apparently chose not to do so in relation to PAYE. Had such an arrangement been made before the PAYE defaults arose, that could have protected the taxpayer's interest.

8. Ms Cowan added that "special circumstances" in the sense required by para 9(2) did not arise which would enable a reduction in the penalties to be made. The  
30 difficulty, she submitted, seemed to arise from an inability to pay, and that was excluded as a "special circumstance" in terms of sub-paragraph (2). Nor, she argued, did any argument of *proportionality* arise.

## Conclusion

9. We consider that the stance of HMRC is well-founded. The delays in payment  
35 of PAYE are admitted. The Schedule showing the payments and individual delays was agreed and has been adjusted in light of *Agar*. The rules as to the calculation of the penalties as set out in Schedule 56 have been followed. The first late payment is excluded and the percentage charge is geared to the number of failures.

10. Having been addressed on the matter of *reasonable excuse* in some detail, we  
40 considered paras 16(2)(a) and (b) with some care. These provide that in determining whether there is a reasonable excuse for failure to make payment –

- “(a) An insufficiency of funds is not a reasonable excuse unless attributable to events outside [the taxpayer]’s control,
- (b) Where [the taxpayer] relies on any other person to do anything, that is not a reasonable excuse unless [the taxpayer] took reasonable care to avoid the failure, ...”.

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11. We do not consider that either provision assists the taxpayer. While there were short delays in certain instances by Sainsburys, there was no ultimate failure to make payment. The delays do not seem to be exceptional or systemic, and, it was suggested by Mr Barnet, could be overcome by careful processing by the supplier.

10 12. The dismissed financial controller was not apparently responsible for the delays in payment of PAYE. She was suspended in about October 2010, and while not replaced until the following March, there were other full-time administrative employees who could take over this duty reasonably readily.

15 13. We agree too with Ms Cowan that a reduction because of “special circumstances” was not warranted in this particular case. It was unfortunate that the company had not approached HMRC to negotiate a “time to pay” arrangement in respect of PAYE. We did note the matter of a relatively small overpayment of tax by the parent company, but we did not consider that this enabled us to modify the penalties sought. In the course of his submissions Mr Barnet laid emphasis on the  
20 general economic and banking difficulties which prevailed at the material time. We are, of course, conscious of this, but it affected the business community generally. We do not consider that it can in each and every instance be invoked as a *reasonable excuse* for late payment.

25 14. Accordingly we consider that the appeal falls to be dismissed, and the penalties confirmed.

30 15. 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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**KENNETH MURE, QC**  
**TRIBUNAL JUDGE**

**RELEASE DATE: 19 November 2012**

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