



TC03771

Appeal number: TC/2013/03694

PAYE late payment penalty – Sch 56 FA 2009 – did a delay in repayment of VAT amount to reasonable excuse for late payment of PAYE-no – was penalty disproportionate or unfair-no- appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SHASUN PHARMA SOLUTIONS LTD

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE BARBARA KING
MR JOHN DAVISON**

Sitting in public at North Shields on 12 June 2014

Lee Muter of UNW, accountants for the Appellant

Aidan Boal of HM Revenue and Customs, for the Respondents

DECISION

The issue.

5 1. This decision concerns a penalty of £19,704.23 imposed by the respondents (“HMRC”) for late payment of PAYE and National Insurances contributions (together referred to as “PAYE”) in the tax year 2011-12.

2. HMRC had originally imposed a penalty based on seven defaults in the tax year 2011-12 but subsequently accepted that it should be imposed for four defaults. The
10 appellants (“Shasun”) wish to continue the appeal on the basis that they believe they can show reasonable excuse for a further two defaults.

The law

3. Penalties for the late payment of PAYE under schedule 56 of the Finance Act 2009 were introduced from 6 April 2010. The new regime is considerably more
15 stringent than its predecessor and was brought in to try and ensure that PAYE is paid on time.

4. Penalties are based on the number of defaults in the tax year. The first default in any tax year is disregarded altogether. The remaining defaults trigger a penalty of 1% for 1-3 faults, 2% for 4-6 defaults, 3% for 7-9 defaults and 4% for ten or more
20 defaults. An inability to pay does not represent special circumstances which might justify a reduction in penalty.

5. Paragraph 16 (2)(a) of schedule 56 specifically provides that an insufficiency of funds is not a reasonable excuse unless attributable to events outside the tax payers control.

25 6. Paragraph 16(2)(b) of schedule 56 provides that where the taxpayer relies on another person to do something, that reliance is not a reasonable excuse unless the tax payer took reasonable care to avoid the failure.

7. For any late payment where reasonable excuse is found then failure to make the payment on time does not count as a default for the purposes of calculating the
30 percentage penalty for any remaining late payments.

Background

8. The United Kingdom base of Shasun Pharma Solutions Limited (“Shasun”) is in Cramlington in Northumberland and has a turnover over of approximately £30 million. The parent company, based in India, has a turnover of approximately £200
35 million. Trevor Laidler, head of Finance and Treasury for Shasun in Cramlington since February 2011 had made a statement dated 1 March 2014 and also gave oral evidence. He was appointed as a financial controller, based in Cramlington, in

February 2011. His prime role is cash flow management and he is also responsible for VAT returns and payments of PAYE.

9. Shasun make key ingredients for the pharmaceutical industry. Mr Laidler described the industry as low volume - high value. One payment from a customer can represent 50% of their cash flow – ie any delay by a customer can delay the company's ability to pay its liabilities. The company has a bank account with Royal Bank of Scotland which has no overdraft facilities but has a revolving credit facility of over five million with another bank.

Arguments on behalf of the Appellants

10. Mr Muter put forward the following grounds of appeal for Shasun. He believes Shasun can show reasonable excuse for the late payments in months '4' and '9', because VAT was being withheld by HMRC. Shasun relied on HMRC to repay the VAT in a timely manner. In five of the six months before month '4', and in eight out of the eleven months preceding month '9', VAT had been paid on the same day as the claim for VAT. .

11. There was an issue about PAYE for the year 2010-11 which led to confusion which contributed to the late payment in month 9 of 2011-12. HMRC alleged that a sum of £57,408.31 (including interest) was still outstanding for 2010-11. This was referred to in a letter dated 17 May 2011 from HMRC. Shasun tried on several occasions to explain that they believed that they had overpaid PAYE in 2010-11 because they had made a payment of £72,610.14 on 14 February 2011 which had not been allocated correctly.

12. If reasonable excuse is not accepted the penalty is unfair or disproportionate. The penalty calculated as 2% of four out of the five defaults comes to £19,704.23. On two of those occasions the payment was only one day late. If the penalty were calculated as 1% on three out of four defaults it would come to £9,535.44. The difference of £10,168.80 is disproportionate, or unfair, when the delay in payment was only a few days. The payment of £9,535.44 would be a fairer penalty.

Discussion and findings re payments considered in this appeal.

13. Month 1

Tax period ended	Due date	PAYE paid	In Time /or late	VAT claimed	VAT repaid
5.5.11	22.5.11	23.5.11	late	12.5.11	12.05.11

The late payment of PAYE was one day late because 22 June 2011 was a Sunday. Shasun have not sought to argue that they have reasonable excuse for not making this payment on the previous Friday. The default does not attract a penalty as it is the first default of the tax year. We find that repayment of the VAT does not appear to have played a major part in determining when the PAYE was paid.

14. Month 2

Tax period ended	Due date	PAYE paid	In Time /or late	VAT claimed	VAT repaid
5.6.11	22.6.11	4.7.11	late	7.6.11	7.6.11

5 HMRC accept reasonable excuse due to an exceptional late payment from a customer of Shasun. The late payment does not count as a default. The repayment of VAT does not appear to have played a part in determining whether the PAYE could be paid in time.

15. Month 3

Tax period ended	Due date	PAYE paid	In Time /or late	VAT claimed	VAT repaid
5.7.11	22.7.11	22.7.11	In time	8.7.11	8.7.11

10 The PAYE has been paid in time but this was sometime after the VAT repayment had been made.

16. Month 4

Tax period ended	Due date	PAYE paid	In Time /or late	VAT claimed	VAT repaid
5.8.11	22.8.11	30.8.11	late	8.8.11	HMRC say 24.8.11 Shasun say 30.8.11

15 There were no bank statements to show that the repayment of VAT did not happen until 30 August 2011, or that the PAYE could not have been paid until the 30 August 2011. This appears to be the only occasion when Shasun say they made the PAYE payment on the same day as the VAT repayment was made. We find Shasun had not come to rely on the prompt repayment of VAT in order to be able to pay their PAYE. We find that reasonable excuse has not been shown for the late payment of PAYE in this month.

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17. Month 5

Tax period ended	Due date	PAYE paid	In Time /or late	VAT claimed	VAT repaid
5.9.11	22.9.11	28.9.11	late	9.9.11	9.9.11

25 Shasun said in their letter of 8 April 2013 that this was due to a major customer paying late. HMRC, in there letter of 26 April 2013 did not accept that there was a reasonable excuse for the late payment in this month as the problem appeared to be an ongoing problem stemming from the delayed payment which caused the delay in month 2. At the hearing Shasun did not seek to show that they had a reasonable excuse for this month. We note that the VAT repayment had been made promptly by

HMRC on 9.9.11 but the PAYE was still paid late. We find that the late payment counts as a default.

18. Month 6

Tax period ended	Due date	PAYE paid	In Time /or late	VAT claimed	VAT repaid
5.10.11	22.10.11	27.10.11	late	11.10.11	11.10.11

5 Our findings are the same as for month 5. Shasun said in their letter of 8 April 2013 that this was due to a customer paying late. They did not seek in the hearing to show that this was exceptional such that it might amount to a reasonable excuse. The VAT repayment had been made promptly by HMRC but did not avail Shasun in paying the PAYE on time. We find the late payment counts as a default.

10 19. Month 7

Tax period ended	Due date	PAYE paid	In Time /or late	VAT claimed	VAT repaid
5.11.11	22.11.11	13.1.12	TTP	8.11.11	9.11.11

A 'Time to Pay' ("TTP") agreement was reached on 16 November 2011. HMRC cancelled the TTP but subsequently agreed that Shasun have reasonable excuse for the late payment. This late payment does not count as a default.

15 20. Month 8.

Tax period ended	Due date	PAYE paid	In Time /or late	VAT claimed	VAT repaid
5.12.11	22.12.11	20.12.11	In time	7.12.11	7.12.11

The PAYE was paid before the due date, but some days after the VAT repayment

21. Month 9

Tax period ended	Due date	Date paid	In Time /or late	VAT claimed	VAT repaid
5.1.12	22.1.12	23.1.12	Part late	10.1.12	9.2.12

20 The claim for a repayment of VAT in the sum of £291,057.08 was made by Shasun on 10 January 2012. HMRC did not repay it until 9 February 2012 but it was then treated as if it had been paid on 13 January 2013. As the VAT repayment was not sufficient to cover all of the PAYE due, Shasun were always going to have to pay the additional amount of £31,668. The due date in this month was a Sunday. Payment was made on the Monday. We find that the information which Mr Laidler had on Monday 23 January 2012, when he made the payment of £31,668, was no different to the
25 information which he had had on Friday 20 January 2012. We find there was no reasonable excuse for not having paid it on the Friday. This late payment does count as a default.

22. We find that there were telephone conversations and emails on 16 and 17 January 2012 relating to the possible outstanding amount of PAYE from 2010-11, but this issue had been ongoing for several months and was not resolved until sometime in February 2012, when the payment of £72,610.14, which had been made on 14 February 2011 was correctly identified and credited to the account for Shasun.

23. No part of the VAT repayment claimed, in the sum of £291,057.08, which was eventually credited to the PAYE account for Shasun has been held by HMRC to be late and therefore subject to a PAYE penalty. When it was repaid by HMRC on 9 February 2012 together with a supplement, it was treated as if it had been repaid on 13 January 2012.

24. Mr Muter referred us to the case of *Graffiti Busters Limited v HMRC* [2014] UKFTT 061 (TC) which held that the appellants had reasonable excuse for the late payment of VAT because HMRC were holding ‘incorrectly deducted CIS payments’. In this case the deductions had been made incorrectly by clients of Graffiti Busters Limited (“Graffiti”) and they had been unable to prevent the incorrect deductions being made. The payments were found to be held in error by HMRC but it was an error which had not been contributed to by Graffiti and they had taken steps to prevent it happening. These facts were specific to this particular case. In the appeal before us we find Shasun did have control of the identification of payments of PAYE to HMRC and if a payment had been made, and incorrectly identified, Shasun needed to pursue the matter to find the payment made in February 2011. The problem relating to this went on for several months and we find that it cannot be said that HMRC were incorrectly withholding VAT. If HMRC delayed beyond a certain period supplements were paid, but this did not make the initial delay incorrect.

25. Month 10

Tax period ended	Due date	PAYE paid	In Time /or late	VAT claimed	VAT repaid
5.02.12	22.02.12	HMRC initially said 17.3.12 but now accept error	HMRC accept VAT reclaim can be offset	6.2.12	27.3.12

We find that this month does not count as a default.

26. Month 11

Tax period ended	Due date	Date paid	In Time /or late	VAT claimed	VAT repaid
5.03.12	22.03.12	17.03.12	In time	14.3.12	23.3.12

Payment made in time.

How many defaults count?

27. We find that there are defaults in months 1, 4, 5, 6 and 9. The first default does not count, leaving four defaults in the year 2011-12. The penalty is therefore charged at 2% of the total PAYE paid late in each of those months. The total PAYE paid late in those four defaults is £985,211.60 and so the penalty comes to £19,704.23.

Is the sum of £19,704.23 disproportionate or unfair?

28. Mr Muter referred us to the case of *Trinity Mirror PLC* [2014] UKFTT 355 (TC) in which a payment of VAT of £4,795,005.45 was paid one day late by Trinity Mirror in 2007. They had made a total of two payments late in the years from 1986 to 2007 and this resulted in a penalty of £95,900. The Tribunal found the penalty to be disproportionate and having no power to mitigate the penalty, set it aside.

29. We find that the circumstances of the appeal before us are different. There were in fact five late payments in the year 2011-12. Only the first and the last were one day late. The others were several days late. The penalty here is £19,704.23. We do not find that it can be said to be wholly disproportionate.

30. This Tribunal has no authority to reach a compromise. We cannot find that the penalty should be £9,535.44 because it looks fairer, based on the number of days late. The cases of *HMRC v Hok* [2012] UKUT 363 and *Bosher* [2013] UKUT 0579 (TCC) have held that it is not open to a first tier tribunal to adjust a penalty because it is felt to be unfair. It is open to an appellant to prove a statutory defence, such as reasonable excuse, but if that fails, then the penalties must be applied in accordance with the law. The Tribunal has no power to substitute an amount other than the correct amount. HMRC have a discretionary power to mitigate a penalty due to special circumstances. If HMRC do not exercise that discretion there is no right of appeal against it to the first tier Tribunal.

Decision.

31. The appeal is dismissed and the penalty of £19,704.23 is confirmed

32. 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.

**BARBARA KING
TRIBUNAL JUDGE**

RELEASE DATE: 2 July 2014