TC02129

Appeal number: TC/2011/05990

Penalties – late payment of PAYE – Schedule 56 Finance Act 2009 – Reasonable excuse – Appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

SHINE TELECOM LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE LADY MITTING
TIM RATCLIFFE

Sitting in public Manchester on 15 June 2012

Philip Harvey by telephone for the Appellant

Ian Birtles instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The Appellant was appealing against a penalty charged under Schedule 56 Finance Act 2009 for late payment of PAYE. The penalty was notified on 29 June 2011, for the tax year 2010-11, and was in the sum of £4,823.04. Following a post *Agar* review, the final month was taken out of the calculation and an amended penalty in the sum of £3,189.52 was notified on 11 April 2012.

2. We took the Appellant's case from its Notice of Appeal, a letter to HMRC dated 7 July 2011 and telephone representations made in the course of the hearing by Mr Philip Harvey, the Appellant's managing director.

3. The Appellant is a provider of telecommunications employing some 25 members of staff. During the tax year 2010-11, all but one of the monthly PAYE payments were rendered late, thus giving rise to a penalty under Schedule 56 Finance Act 2009. The penalties are structured on a sliding scale and as the Appellant defaulted on at least ten occasions, a penalty rate of 4% was applied. Mr Harvey did not contend that a penalty was not due and did not challenge the calculation. The essence of his case was that the amount was unreasonably punitive and issued without warning and due to the company's financial situation, there was a reasonable excuse for a default. Paragraph 16 of Schedule 56 provides that liability to a penalty does not arise in relation to any failure if there is a reasonable excuse for that failure provided that once the excuse has ceased the failure is remedied without unreasonable delay. Paragraph 16(2) excludes from constituting a reasonable excuse reliance on another and an insufficiency of funds unless such is attributable to events outside the employer's control.

4. Mr Harvey described to us cashflow difficulties which, in his words, were shared with numerous other small businesses. The Appellant had two major suppliers who had to be paid on time otherwise supplies would have dried up but against that its customers were numerous and small and frequently paid late. There was therefore a continuing inbalance between outgoings which had to be made on time and income which always had to be chased. The company had a £100,000 overdraft which came up for renewal in March 2010. For the following six months, the bank reviewed the facility each month rather than renewing it on an annual basis which the company had expected. The company thus never knew where it was and in fact the bank imposed a reduction in the facility of £5,000 each month. Mr Harvey deliberately did not contact HMRC to arrange a payment schedule as he was constantly trying to keep up with cashflow and did not want to build up a further bill to be met at the end of the year. He therefore took it upon himself to structure the payments in the best way he could afford but this inevitably involved late payment each month. However, Mr Harvey pointed out that payment for each month was always made before the following month's payment was due. The company now has a new banking facility in place and Mr Harvey was confident that all future payments would be made by the due date. A penalty of the level now required would inhibit the potential employment growth planned by Mr Harvey. Mr Harvey also contended that the penalty was issued

without warning and was against the government's efforts to produce a business-friendly environment in which small businesses could grow. He believed it to be unreasonable that HMRC waited twelve months before advising the Appellant of its liability to a penalty.

5. Mr Harvey also added, and we should say that we accept this without reservation, that he and his co-director took no payments themselves during the year in question and he wished to make it clear, which again we accept, that this is not a case where the directors were taking income which should have been due to HMRC.

6. We deal first with Mr Harvey's submission that the penalty was unreasonably punitive and was issued without warning. It is not the case that the company had no warning of its liability to a penalty. As far back as September 2009, HMRC had set out to advise employers of the new penalty regime. The September 2009 Employer Bulletin set out details of the scheme in full and it was also referred to repeatedly in subsequent issues of the Bulletin. It featured on the PAYE pages of the HMRC Internet site and in February 2010 an employer pack containing a CD Rom was mailed to all employers setting out again how the scheme worked. No employer should have been ignorant of the new regime and the payment deadlines. As regards this particular company, a late payment penalty warning letter was issued on 28 May 2010 advising that the company may be liable to a penalty if it paid late more than once in the tax year. The company were advised to pay its overdue PAYE immediately and to pay on time in future. After further payments had still been made late, HMRC contacted the company on 8 September 2010 and 1 February 2011 when again the company was warned of the penalties liable to be incurred for late payment. Given the structure of the regime and the sliding scale dependent upon the number of defaults, we do not consider the regime to be either disproportionate or unreasonably punitive. Mr Harvey had argued that HMRC should not have waited twelve months before imposing a penalty but this is inevitable given the nature of the calculation to be made.

7. We fully understand the company's cashflow problems and have huge sympathy with Mr Harvey but as cited earlier in this decision, a shortage of funds is expressly excluded from constituting a reasonable excuse unless it is outside the control of the employer. We appreciate Mr Harvey's reasons for not so doing but the fact remains that it would always have been open to him to contact HMRC and reach some sort of agreement with them. The letter which was sent out on 28 May 2010 specifically stated that if the Appellant were unable to pay it should contact HMRC before the payment date and extra time may be given. Mr Harvey, himself, likened his cashflow problems to those shared by numerous other small businesses and there was insufficient evidence before us as to how the cashflow was managed for us to be able to find that it was entirely attributable to events outside the company's control. However, in addition to general cashflow problems, Mr Harvey specifically cited the problem with the bank. The company had been expecting its overdraft facility to be renewed for a full twelve period. Not only did the bank refuse to make that commitment to the business and dealt with it on a month by month basis but it also reduced the facility by £5,000 each month. Although we saw no figures, we fully

accept Mr Harvey's evidence that this had a critical impact on his ability to manage the company finances. There was insufficient evidence before us to find that this excuse should hold good for the entire twelve month period but we do accept that it would constitute a reasonable excuse for the first three months.

8. We therefore find that the company did have a reasonable excuse for the first three months but not thereafter and the appeal is allowed in part. This will lead to a recalculation of the penalty. We have carried out our own calculation which we set out below but our calculation is subject to ratification by the parties. If either of the parties wishes to make any representations with regard to our methodology in the calculation, they should apply to the Tribunal within 14 days of the release of this decision. If no such representations are received then the Tribunal directs that the penalty should stand in our stated figure.

9. We have worked our calculation from that contained on page 8 of the bundle of documents. We have taken out months 1, 2 and 3 as being the reasonable excuse periods. We have also taken out month 12, this month being the post *Agar* revision. There was no default in month 9. That leaves in month 4-8 and 10 and 11, seven defaulting months. Seven defaulting months attracts a 3% penalty but period 4, being the first of the defaulting months, attracts a nil penalty. We have then calculated the remaining six months at 3% reaching the total penalty of £2,211.02.

10. 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.

LADY MITTING
TRIBUNAL JUDGE

RELEASE DATE: 12 July 2012