



TC02213

Appeal number: TC/2012/00422

INCOME TAX – PAYE – Schedule 56 Finance Act 2009 – penalty for late payment – what constitutes late payment – based on time of receipt of cheque by HMRC, not clearance of cheque – either late or not, without flexibility – number of occasions considered – payment record for periods in other tax years not relevant – payments under time to pay agreement only excluded where due after agreement requested – whether employer aware that penalty liability accumulating – held, on facts, that information was provided by HMRC contacts and through Employer Bulletin and website – penalty calculation not linked to interest, and penalty not disproportionate – HMRC decisions as to penalty and amount affirmed – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SPORTICAL GLOBAL COMMUNICATIONS LIMITED Appellant

- and -

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

**TRIBUNAL: JUDGE JOHN CLARK
KAMAL HOSSAIN FCA**

Sitting in public at 45 Bedford Square, London WC1B 3DN on 21 June 2012

Mike Laffin, CEO, for the Appellant

Jack Lloyd, Presenting Officer, HM Revenue and Customs, for the Respondents

DECISION

1. The Appellant (“Sportcal”) appeals against a penalty determination by the Respondents (“HMRC”) issued on 15 August 2011 under Schedule 56 to the Finance Act 2009. (All references to Schedule 56 in this decision are to that Schedule.)

2. At the end of the hearing, we announced our decision in the following terms:

“The Tribunal has considered the evidence and the arguments of both parties. The Tribunal finds, in the light of Schedule 56 to the Finance Act 2009, that the number of defaults by the Appellant in respect of 2010-11 was seven: the legislation does not permit flexibility in relation to the time of payment. The Tribunal further finds that, following the first late payment, HMRC notified the Appellant where information about penalties could be found on their website, and told the Appellant that any overdue PAYE should be paid now, and that PAYE payments should be made on time in the future. In relation to payments under the time to pay agreement, it was necessary for all the cheques in payment to reach HMRC by the specified dates in order not to give rise to penalty defaults, and on one occasion this condition was not fulfilled.

The Tribunal considers that it would be desirable for more information about the penalty system to be included in the first notification letter and that the importance of this letter should be made clear. However, this is merely a question of HMRC’s practice, and does not affect the liability of the taxpayer to the penalties found to be due.

The Tribunal also considers that HMRC’s website information as to calculation of the penalties should be amended to match the terms of Schedule 56, to avoid the risk of confusion.

The Tribunal finds that the penalty is properly due, that there is no reasonable excuse for the late payment, and that there are no special circumstances justifying any reduction in the amount of the penalty.

It is regrettable that no copies of the bundle reached the Appellant. We suggest that HMRC check with appellants in advance of hearings that all relevant documentation has been received.

Whilst the Tribunal is conscious of the Appellant’s difficulties in respect of the payments and the incurring of the penalties, it must dismiss the Appellant’s appeal.”

3. Following the announcement of our decision, Mr Laflin requested a full decision setting out the facts, our findings and the reasons for our decision.

40 *The facts*

4. The evidence consisted of a single bundle of documents. There was no oral evidence. From the evidence we find the following facts.

5. A number of Sportcal's payments of monthly PAYE for the year 2010-11 were made after the due dates. Mr Laflin, in his letter to HMRC dated 9 September 2011, stated that the payments from month 4 onwards had been sent to HMRC on the dates set out below; he commented that, allowing for one day delay in the post, this should have resulted in HMRC receiving Sportcal's payments either on time or with a few days' delay. On this basis, he also indicated whether each of the payments had been delayed:

- Month 4 – 17 August: 1 day early
- Month 5: 21 September – 3 days late
- 10 Month 6: 26 October – 7 days late
- Month 7: 1 December – 13 days late
- Month 8 – 10 January – 21 days late (closed for Christmas and New Year)
- Month 9: 26 January – 7 days late
- 15 Month 10: 18 February – on time
- Month 11: 15 March – 3 days early
- Month 12: 20 March – 3 days late

6. He said that at the start of Sportcal's financial year in May 2011, it had been in arrears with its PAYE. There had been a meeting with a representative of HMRC, who agreed to allow Sportcal to pay the amount due in respect of its month 2 payment over a period of three months (6 October, 6 November and 6 December). It was also agreed that the month 3 payment should be made by 30 July.

7. According to HMRC's records, their officer Ian Miller had met Mr Laflin on 15 July 2010. Mr Laflin requested "Time to Pay" for months 2 and 3; he explained that cash flow was tight because Sportcal had had to fight a court case which it had won, and from which it was expecting a settlement of £27,000. Mr Laflin had proposed the following (as set out in HMRC's database record):

- "Month 1 today; cheque collected for £20,749.94
- 30 Month 2 £20, 884.05 payable in 3 instalments of £6,962.00 on 06.08.10, 06.09.09.10 & 06.10.10
- Month 3 £20,472.74 payable on 30.07.10
- Month 4 et seq to be paid on time
- I reviewed the company's cash flow and saw that the above had been built in so I agreed to his request. I said I would issue a letter of confirmation but warned of further distraint action if the arrangement breaks down.
- 35 Letter issued."

8. According to HMRC's internal records, a telephone call had been made by HMRC to Sportcal on 25 May 2010. Mr Laflin had promised to pay the month 1 tax

the following day. The officer advised him to make monthly payments by BACS, which would allow payment to be received by the 22nd of each month.

5 9. On 27 May 2010 a “P101” notice was issued. These notices set out the amount of the PAYE debt. On 15 June 2010 Mr Laflin telephoned to tell HMRC that the month 1 payment would be paid by cheque on 29 June 2010. On 1 July 2010 HMRC issued a further P101. After the note of the meeting between Mr Laflin and Ian Miller, HMRC’s records show that a further P101 was issued on 30 July 2010.

10 10. The next part of HMRC’s record included in the evidence, a note on 26 October 2010, shows that Mr Laflin had promised that a payment of £20,55.47 would be made on 25 October 2010. A further P101 was issued on 26 October 2010 in respect of month 6. On 24 November 2010 a P101 was issued in respect of month 7. On 29 December 2010 a P101 was issued in respect of month 8. A P101 in respect of month 9 was issued on 26 January 2011. No further HMRC records were included in the evidence.

15 11. On 15 August 2011 HMRC issued a penalty notice to Sportcal under Schedule 56. The amount of the penalty was £5,813.32. Mr Laflin responded with his letter of 9 September 2011. On 19 September 2011 HMRC wrote to Sportcal; the letter was headed “Penalty notice for late PAYE payment”, and stated that the penalty amount was £5,199.64. The calculation included in the letter showed that the months for
20 which the payments had not been made on time were months 1, 2, 5, 6, 7, 8, 9, 10 and 12. No penalty was payable in respect of month 1. In a separate letter the same HMRC officer explained that he agreed that part of the late payment penalty was not due, because HMRC had allowed Sportcal to pay month 3 late before the month 3 payment date. He had therefore reduced the penalty charge. He continued:

25 “Time to pay proposals agreed after the payment date do preclude penalty charges.”

(We comment below on the latter sentence of his letter.)

30 12. Mr Laflin responded on 5 October 2011. He set out reasons why he considered that the penalty should be reduced. He offered to pay a sum of £848, indicating that this was “a reasonable amount of interest for the 4 occasions that we were a week or more late”. If this proposal was not accepted, he wished to proceed with an internal review.

13. On 18 November 2011, Miss F MacDonald, a Collector in HMRC’s Debt Management office in Essex, wrote to Mr Laflin setting out the results of her review.

35 14. Mr Laflin responded on 15 December 2011. He expressed disappointment, and indicated that he would be referring the matter to an independent tribunal. On the same day he wrote to the Tribunals Service to express the wish to appeal against the penalty. No copy of Sportcal’s Notice of Appeal dated 15 December 2010 was included in the bundle.

15. On 9 December 2011 HMRC's Central Policy office had written to the Tribunals Service requesting a standover of appeals against penalties under Schedule 56, in order to consider the implications of recent Tribunal decisions, in particular *Agar Ltd* (TC/2011/04910), and to take any necessary action.

5 16. In its acknowledgment dated 21 January 2012 of Sportcal's Notice of Appeal, the Tribunals Service referred to the letter from HMRC dated 9 December 2011, and enclosed a copy.

10 17. On 11 April 2012, K Sharpe, a Collector in HMRC's Essex Debt Management Office, wrote to the Tribunals Service to explain that when HMRC had worked out Sportcal's late payment penalty for 2010-11, they had treated the late payment of amounts due on 19 or 22 April 2011 as being a default during the year 2010-22. This had been reconsidered as a result of the *Agar* decision, which was that the payment due on 19 or 22 April 2011 should not be treated for the purposes of late payment penalties as a default during the tax year 2010-11. HMRC had accepted that decision.
15 HMRC had revised the penalty charged to Sportcal. The revised penalty amount was £4,491.74.

18. The calculation attached to that letter showed that the payments for months 1, 2, 5, 6, 7, 8, 9 and 10 had been made late. No penalty was due in respect of month 1. There had therefore been seven defaults, the total amount of the payments in question
20 being £149,724.79. The note at the end of the calculation stated:

“Note: Any amounts that are included in a time to pay agreement do not count as a failure to pay on time, so long as

- the time to pay agreement is made before the due date, and
- you keep to the terms of the arrangement”

25 *Arguments for Sportcal*

19. Mr Laflin referred to the factual history. He stated that the reduction of penalty referred to in HMRC's letter dated 11 April 2012 had reduced the number of penalty periods to seven. He argued that seven penalty periods should attract what he described as two per cent interest and not 3 per cent interest, thus reducing the penalty
30 from £4,491.74 to £2,994.49.

20. The June payment had been an agreed late payment with Ian Miller of HMRC, who had agreed to allow Sportcal to make the payments in three stages due to cash flow problems. Mr Laflin questioned whether this counted as a late payment. If not, this would reduce the amount owing to £128,840.74 at 2 per cent, ie £2,576.82.

35 21. A cheque for £23,704.54 had been sent on Friday 18 February 2011 in respect of month 10. This would have been received by HMRC on Monday 21 February 2011 and cleared through the bank three days later. He asked whether this counted as a late payment. He further questioned what the definition of a late payment was. There was no clarity as to whether cleared funds were required by the 19th day of the appropriate
40 month, or whether a cheque was required by that date. This cheque had been sent on

the first working day after 19th February. He submitted that it should not be classified as a late payment for penalty purposes.

22. If it was not late, it would reduce the amount owing to £105,133.20 at 2 per cent. This was £2,102.66.

5 23. Mr Laflin also referred to the payment for month 5. The amount due was £20,276.26. This had been sent two days late, on 21 September 2010, and had been cleared through the bank by 24 September 2010.

24. He referred to the current payment period having been changed to the 22nd of each month and not the 19th, to allow struggling companies more time to pay their PAYE on time. He questioned why this had not been introduced in 2008 when many
10 companies had been struggling at the same time and when this late payment structure had been introduced.

25. Whilst he accepted that Sportcal had paid its 2010-11 PAYE late on five occasions, on one of these (made in February 2011) the payment of £23,704.54 had
15 been made on 21 February. He submitted that it was rather harsh to be charged interest or penalty fines for that payment.

26. There was a huge difference between the “fine” as found and five late payments. Further, if it were accepted that four payments should be counted as late, this would reduce the total late tax to £84,856.94 and the penalty would be at 1 per
20 cent, ie £848.57. This had been the sum which he had offered, in his letter dated 15 December 2011 responding to Miss MacDonald’s review letter, to pay to HMRC.

27. He accepted that Sportcal had been a week late on two occasions, 21 days late following Christmas, and 13 days late on one occasion. This was a total of 48 days
25 late. If this sum were to be borrowed at an APR of 10 per cent, the cost would be £1,115.93. He criticised the system of calculation of the penalties, and submitted that a penalty of over £3,000 more than this was excessive.

28. He referred to the history of Sportcal’s payments during 2010-11. In relation to the payment due in February, he had problems with the idea of payment if the 19th
30 was a Saturday. He referred to previous advice that if payments were made within three days of the due date, this would suffice. There was a difference between what was currently on HMRC’s website and what it had previously shown.

29. With reference to the explanation given at the hearing of the way in which the penalties were calculated, he had no idea that this was the method. He accepted that
35 he had not looked at the website to see this. He emphasised that the previous advice from HMRC had been that payments could be delayed as long as they were made within two or three days of the due date.

30. He referred to the history of the late payments; he had been engaged in a lot of business overseas, and Sportcal had had cash flow problems. He accepted the point
40 made in HMRC’s argument that the law was inflexible. He expressed surprise that there was no flexibility in relation to late payments. He requested that Sportcal should

be subjected to penalty for four of the eight periods. He also thought that HMRC's website was very confusing in its description of the calculation of the penalties. At the end of his reply he pointed out that he had not received a copy of the bundle for the hearing.

5 *Arguments for HMRC*

31. Mr Lloyd referred to Sportcal's grounds of appeal as appearing from the correspondence:

10 (1) Sportcal felt that there had been no warning of the size and scale of the fines, and considered the penalties to be disproportionate and excessive in relation to the lateness of its PAYE payment;

(2) There had been no notification that the payments were late, and no notification that a penalty was due;

15 (3) As Sportcal had been in arrears with its payments, it had agreed, through an agreement with an official of HMRC, that the month 2 and month 3 payments would be made in accordance with the terms of that agreement;

(4) The penalty made no allowance for the fact that Sportcal always paid the correct amount of PAYE and in some cases only paid a day or two late. It was suggested that Sportcal would accept the penalties on those four payments which had been a week or more late;

20 (5) HMRC was being intransigent in not reducing those penalties incurred when the payments had been just a day or two late.

32. Mr Lloyd commented that if there were seven defaults in a year, the percentage would be 3 per cent and not 2 per cent as Mr Laflin had argued; this was clear from Schedule 56. (Mr Laflin interjected that this did not match the information shown in Miss MacDonald's letter; we comment on this below.)

33. Mr Laflin had raised the question of what constituted a late payment. Mr Lloyd referred to the month 2 payment. This had been made under a time to pay agreement, but the agreement had been concluded after the due date for that payment. In relation to the issue of being "slightly late" with a payment, there was no flexibility; HMRC needed to have received the payment cheque on the 19th of the month. This was made clear by HMRC's website. Mr Lloyd submitted that as regards the specific instances of Sportcal's "slightly late" payments, there was no flexibility and that therefore they were late.

35 34. HMRC had issued seven late payment notices confirming the PAYE payments had been made late; these were P101 notices, issued as automated letters. These notices did not refer to penalties, but the letter dated 28 May 2010 notifying Sportcal of the first late payment of PAYE for 2010-11 had done so. This letter warned of action being taken against employers who did not pay PAYE on time, and gave details the location on HMRC's website where information on penalties could be found.

35. Mr Lloyd referred to Sportcal's previous payment history; we comment below on whether this assists the tribunal in such cases.

36. He referred to the various telephone and other contacts made by HMRC officers to inform Sportcal about its late payments. Warnings had been given by telephone, and an officer had visited Sportcal's premises to ensure payment of one month's PAYE.

37. He referred to the publicity which had been given in relation to the new penalty system coming into operation.

38. There had been nothing to convince HMRC that Sportcal had had a reasonable excuse for not making its payments on time, nor had any convincing evidence been produced to demonstrate this. Mr Lloyd referred to paragraph 16(2)(a) of Schedule 56, relating to insufficiency of funds not amounting to a reasonable excuse unless attributable to events outside the person's control.

39. Mr Laflin had argued that the penalties were excessive. Mr Lloyd submitted that the penalty scale was set out in the legislation, and that the penalties were staged and proportionate. Cash flow was one of the normal hazards of trading. Employers should make arrangements so that they could pay on time. Time to pay arrangements were available, and payments under these (if the agreement was made before the due date for payments made pursuant to it) were not counted for penalty purposes.

40. The position had been made clear in HMRC's Employer Bulletins. Sportcal did not dispute that it had made its payments late; its only dispute was as to the degree of lateness. Sportcal has had no reasonable excuse, except in relation to one payment under its time to pay agreement.

41. Notice had been given in the "penalty warning letter" and on HMRC's website. There was an obligation on employers to keep up to date. Mr Lloyd referred to the phone calls and visit from HMRC; these had been specific warnings in addition to the general information provided. The continuing cycle of delays should be taken into account. As there was no reasonable excuse, Sportcal's appeal should be dismissed.

Discussion and conclusions

42. As a preliminary point, we deal with the lack of provision of a bundle for Sportcal. We are unaware of the reasons for this, but as mentioned in the announcement of our decision at the hearing, we consider that HMRC should ensure that appellants in hearings of this nature are provided in advance with bundles, to enable them to prepare properly for the hearing. We did not think that Sportcal had been unduly disadvantaged by the lack of a bundle, as it was clear that Mr Laflin had carefully prepared his arguments and was familiar with the correspondence. We therefore continued with the process of arriving at and announcing our decision, rather than considering whether to adjourn the hearing for further arguments. If Mr Laflin had informed us at an earlier stage in the hearing that he had not received the

bundle, we would have had the opportunity to consider whether to approach matters in a different way.

43. The relevant parts of paragraph 6 of Schedule 56 provide:

“6—

- 5 (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
- 10 (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—
- 15 (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);
-
- 20 (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) If P makes 1, 2 or 3 defaults during the tax year, the amount of the penalty is 1% of the amount of the tax comprised in the total of those
- 25 defaults.
- (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
- 30 penalty is 3% of the amount of the tax comprised in the total of those defaults.”

The version of this paragraph which applied before 25 January 2011 was different in certain respects, but those differences are not material to the matters covered by the present appeal.

- 35 44. Thus every late payment after the first counts as a “default”. (The first payment will give rise to a penalty if it is made more than six months late, but this is not relevant to Sportcal’s appeal.) A payment of PAYE is late if made after the due date for such payments. Under regulation 69 of the Income Tax (Pay As You Earn) Regulations 2003 (SI 2003/2682), the tax paid otherwise than by electronic payments
- 40 is to be paid within 14 days after the end of the tax period, ie on the 19th of each month. (Tax paid by electronic payments must be paid within 22 days of the end of the tax period, ie by the 22nd of the relevant month.) Regulation 69 does not provide a

definition of “paid” for non-electronic payments. What counts as payment is therefore a matter of HMRC’s practice. On their website, under the heading “How to pay PAYE/Class 1 National Insurance contributions”, they state:

5 **“PAYE/Class 1 NICs payment deadlines and late payment penalties**

PAYE/Class 1 NICs electronic payment deadline

Your cleared payment must reach HMRC's bank account no later than the 22nd of the month following the end of the tax month or quarter to which it relates.

10 If you are a large employer (250 or more employees) you must pay electronically.

PAYE/Class 1 NICs postal payment deadlines

15 If you are not required to pay electronically please ensure your cheque reaches HMRC no later than the 19th of the month following the end of the tax month or quarter to which it relates.”

45. It is clear from this statement, made available generally to employers, that for non-electronic payments HMRC do not require cleared funds to have reached them by the due date. It is also made clear that the cheque must reach HMRC by the 19th of the “payment month”. HMRC do not state within the relevant part of their website what should be done where the 19th falls on a Saturday, Sunday or Bank Holiday, but presumably the payment must be sent in time to arrive before the weekend. (It would be helpful if an explicit statement of the position could be made on the website.) Under the sub-heading “Paying PAYE by post” within the above website page, HMRC state:

25 “To allow for possible postal delays (for which HMRC is not responsible) please allow at least three working days for the payment to reach them.”

46. Mr Laflin’s understanding that the payment periods had been changed generally to the 22nd of the relevant month was incorrect. That date is only applicable to electronic payments.

47. There were two aspects of Mr Lloyd’s submissions which appeared to be based on an incorrect approach to Schedule 56 cases. The first was his reference to Sportcal’s PAYE payment record in previous years. We regard it as irrelevant to refer to earlier periods. Schedule 56 imposes late payment penalties on a year by year basis. It does not assist to refer to earlier periods not subject to appeal, and may appear prejudicial. We have therefore ignored all the evidence relating to previous periods, and Mr Lloyd’s reference to that evidence in his submissions.

48. The second aspect is his reference to the absence of a reasonable excuse except in relation to the time to pay agreement. We should emphasise that the relieving provisions in paragraph 10 of Schedule 56 have nothing to do with reasonable excuse; the employer either complies with that paragraph and obtains the relief, or does not do

so and becomes liable to a penalty in respect of the amount or amounts covered by the agreement. We set out the relevant part of paragraph 10:

“Suspension of penalty during currency of agreement for deferred payment

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10—

(1) This paragraph applies if—

(a) P fails to pay an amount of tax when it becomes due and payable,

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(b) P makes a request to HMRC that payment of the amount of tax be deferred, and

(c) HMRC agrees that payment of that amount may be deferred for a period (“the deferral period”).

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(2) If P would (apart from this sub-paragraph) become liable, between the date on which P makes the request and the end of the deferral period, to a penalty under any paragraph of this Schedule for failing to pay that amount, P is not liable to that penalty.”

Thus, provided payment is made in accordance with the terms of the time to pay agreement and none of the payments due under it was due and payable before it was requested, there will be no penalty in respect of the payments covered by the agreement. The question of reasonable excuse (covered by paragraph 16 of Schedule 56) does not arise unless there is a failure to adhere to the terms of the agreement, bringing the late payment or payments back into the normal Schedule 56 regime.

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49. The wording of HMRC’s letter dated 15 August 2011 (paragraph 11 above) was therefore incorrect; it should have stated: “Time to pay proposals agreed after the payment date do *not* [our emphasis] preclude penalty charges.”

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50. HMRC’s Employer Bulletin, April 2010, Issue 35, provided information on avoiding late payment penalties under the system being introduced for tax periods starting on or after 6 April 2010. The article referred to the times when payment was required, and distinguished between electronic payments, to be paid by the 22nd of each month (unless the 22nd was a non-working day, in which case payment should be made earlier), and other payments, which had to be received by HMRC by the 19th of the relevant month. The article gave limited information about the penalties, but gave HMRC’s website reference to the explanation of the penalty system. Issues 36 and 37 of the Employer Bulletin also provided information on avoiding late payment penalties.

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51. In his letter to HMRC dated 9 September 2011, Mr Laflin stated:

“I am deeply shocked and surprised by the scale and the size of these fines. At no time have we ever been warned of the scale or the size of these fines and in the light of our payment schedule I believe them to be excessive and disproportionate to the lateness of our payments.”

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52. We find that the information in the Employer Bulletins was provided to Sportcal in the normal way. Further, HMRC telephoned Sportcal on several occasions to make it aware of the need to pay its PAYE liabilities and the potential liability to penalties.

53. HMRC's website gives information on the calculation of penalty charges for late monthly and quarterly PAYE payments. Mr Laflin indicated that the information currently on the website was not the same as it had been when he had consulted the website. There was no evidence of the date on which he had done so. We are unable to check how any previous version of the website commentary described the calculation of penalties, as there is no access to former versions. However, as Sportcal had been made aware through Issue 35 of the Employer Bulletin (as well as by HMRC's warning letter after the first late payment) that penalties would arise if payments were made late, it should have been conscious that repeated lateness would result in greater penalties being imposed after the end of the tax year, whether or not it should have known the exact basis on which those penalties would be calculated.

54. According to HMRC's schedule of late payments for 2010-11, nine payments were late. The first, not treated as a default within paragraph 6 of Schedule 56, can be deducted from the total. Further, the payment for month 3 made under the time to pay agreement may also be deducted. As the month 2 payment became due before the request to Mr Miller of HMRC on 15 July 2010 for time to pay, it cannot be deducted from the total, despite being covered by the agreement. As a result, the total number of defaults was seven. We do not accept Mr Laflin's submission that the number of defaults should be regarded as five, or even four. We are satisfied on the evidence that, for the purposes of Schedule 56, there were seven defaults. The applicable penalty percentage is therefore 3 per cent rather than the lower percentages mentioned in argument by Mr Laflin.

55. Mr Laflin argued that some of the payments had been made only slightly late. However, as shown above, there is no allowance for limited lateness; the payments must arrive by the 19th of the relevant month if penalties are to be avoided. According to the schedule produced by HMRC, none of the payments was received only one day late. Mr Lloyd calculated the average as being 14 days late. That calculation is open to debate, due to the payments for months 2 and 3 having been made under the time to pay agreement; although (for the reasons given above) the late payment for month 2 counts as a default, the late payment for month 3 does not. However, the degree of lateness is not relevant; if a payment is late, it enters into the penalty calculation (unless it is the first late payment in the relevant tax year). A payment is either late or not late; there is no intermediate position. Put another way, there is no flexibility in the application of penalties under Schedule 56 (other than for "special reduction" under paragraph 9 of Schedule 56).

56. Mr Laflin argued that the level of the penalty was disproportionate, and that it did not equate to a reasonable interest charge. We do not consider it correct to regard the penalty as having any relationship with a charge to interest. Under Schedule 56, a late payment incurs a potential liability to penalty irrespective of the period of lateness. However, if it is made over six months late, or over twelve months late, further penalties are incurred. The penalty is also calculated by reference to the

amount of tax in default, and not (if greater) the total tax due for the month in question. We are satisfied that the penalties under Schedule 56, being calculated on a scale based on these factors, are not disproportionate. They are imposed with the objective of ensuring compliance by employers with their obligation to make timely payments of PAYE to HMRC, and the facility for employers to escape penalties when they reach a time to pay agreement with HMRC because of financial difficulties is a further factor contributing to the proportionality of the system. We accept the views of the Tribunal in *Agar* on the question of proportionality, considered at paragraphs 42 to 46 of that decision.

57. We are satisfied that the penalty (as subsequently adjusted in the light of the *Agar* decision) is properly due in the sum of £4,491.74 as shown in HMRC's revised calculation attached to their letter dated 11 April 2012. Under paragraph 16(2) of Schedule 56, insufficiency of funds does not constitute a reasonable excuse unless attributable to events outside Sportcal's control. No claim was made that any such events had occurred. Sportcal did not put forward any other basis for any claim that there had been a reasonable excuse for late payment. We therefore find that there is no reasonable excuse for any of the payments being made late. We further find that there are no special circumstances (within paragraph 9 of Schedule 56) to justify any reduction of the penalty.

58. As mentioned in our announcement of our decision at the hearing, we consider that it would be desirable for more information about the penalty system to be included in the first notification (ie warning) letter, and that the importance of this letter should be made clear. We think it likely that providing such information would encourage employers to change their approach to their payment arrangements, or would at least reduce the number of cases in which employers pursue appeals on grounds that they have not been informed before receiving the penalty notice after the end of the tax year concerned. We emphasise that this is a matter of HMRC's practice, and does not affect the liability of the employer to the penalties found to be due.

59. In our announcement we also made reference to the website information concerning the calculation of the penalties. We have since had the opportunity to consider the wording of the information under the heading "Penalty charges for late monthly and quarterly PAYE payments" on the HMRC website page mentioned in Issue 35 of the Employer Bulletin. Whatever this may have shown in any previous version, we are satisfied that it makes the position clear and is related specifically to the terms of paragraph 6 of Schedule 56. However, we think that the way in which the description was given in Miss MacDonald's review letter was unsatisfactory, as this implied that seven defaults would incur a penalty of 2 per cent rather than 3 per cent. The reason for this misleading impression is the inclusion of the first late payment, rather than making the distinction by reference to paragraph 6 of Schedule 56 between "defaults" and the number of occasions of late payment within the relevant tax year. As we have indicated above, the first late payment is not to be treated as a "default" when calculating the overall penalty for the year. Sportcal had eight late payments for 2010-11, and therefore seven defaults. We recommend that in correspondence HMRC should show the scale in the same way as it is currently shown on their website.

60. In accordance with paragraph 15(1) and (2) of Schedule 56, we affirm HMRC's decisions that a penalty is payable in respect of 2010-11 and that the amount of that penalty is £4,491.74. We therefore dismiss Sportcal's appeal.

Right to apply for permission to appeal

5 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
10 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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**JOHN CLARK
TRIBUNAL JUDGE**

RELEASE DATE: 22 August 2012

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