[2013] UKFTT 066 (TC)

TC02486

Appeal number: TC/2012/00646

INCOME TAX - Penalty - late payment of PAYE and NICs - FA 2009, Schedule 56 whether lack of specific warning a reasonable excuse - no - whether any special circumstances existed to justify a reduction in the penalty amount - no - whether the penalty was disproportionate - no appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

PRESTON ELECTRICAL LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE MICHAEL S CONNELL
ALAN R REDDEN

Sitting in public at Phoenix House, Rushton Avenue Bradford on 17 and July 2012

Ms. Louise Preston Director of the Company and Ms Ann Marie Clapham Accountant for the Appellant

Miss Joanne Bartup Officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal against a penalty assessment (as amended) of £8,953.41 imposed under Schedule 56 of the Finance Act 2009 ("Schedule 56") in respect of the late payment by the Appellant of monthly payments of PAYE and National Insurance contributions ("NICs") in months of the year ending 5 April 2011.

2. The Appellant did not pay PAYE and NIC on time in ten of the months in the year 2010 – 11. The dates and amounts of the PAYE payments due and made were not in dispute. The total amount of defaults was £223,835.36 and because there were ten defaults during the tax year that counted towards the penalty, the penalty rate was assessed at 4% of that total amount. The appeal was mainly based on the Appellant's submission that the penalties were unfair and excessive. The Appellant also argued that the reason for late payments was because it was unaware of the introduction of a new penalty regime and that despite frequent contact with HMRC it was never mentioned that penalties would be imposed in the event of any late payments. The Appellant also suffered insufficiency of funds due to debtors defaulting on large sums due to the Appellant, which had to be written off.

Background

3. The Appellant is part of the Preston Group Limited and is an industrial and domestic electrical contractor.

4. From 6 April 2010, a new penalty regime was introduced by HMRC for late payment of monthly PAYE and NIC by employers. Previously, there was a mandatory electronic payment surcharge on large employers (those with over 250 employees). The surcharge ranged from 0% to 0.83% of the amount paid late and depended on the number of defaults in any one year. It was therefore possible for many employers to delay payments to HMRC without incurring any material costs. Under Schedule 56 Finance Act 2009, however, this possibility was removed. Schedule 56 imposes penalties for late payment of PAYE. The legislation in relevant part is set out in below.

5. The penalties under Schedule 56 are based on a sliding scale as shown in the table below. The penalty varies as provided by paragraph 6, subparagraphs (4) to (7). The first default in any year is disregarded altogether. The remaining defaults trigger a penalty of 1%, 2%, 3% or 4% depending on their number. A 4% penalty is payable if there are ten or more defaults during the tax year.

No of failures	Penalty
1	no penalty providing the payment is less than six months late
2-3	1%
4-6	2%
7-9	3%
10 or more	4%

The penalty will not be levied if a) a time to pay agreement had been agreed in advance of the due date(s), b) if there are "special circumstances in terms of paragraph 9 Schedule 56 or c) if the Appellant can establish that there was a reasonable excuse for each or any default.

6. HMRC produced for the hearing, a table showing the amounts of PAYE and NIC due for each of the relevant months, the penalty trigger date for each month, the date that payment was made for each of the months, and number of days that the payment was late in each of the months in which payment was said by HMRC to have been late. The amounts, the due dates, the actual payment dates and the penalty amounts charged are set out in the table below.

PAYE and NIC Due and paid late	Due Date	Payment Date	Days Late	Penalty @ 4%
£22,587.94	19.05.2010	2010	7	£0
£22,563.21	19.06.2010	2010	4	£902.53
£23,589.89	19.07.2010	2010	3	£943.60
£23,958.81	19.08.2010	2010	9	£958.35
£24,031.89	19.09.2010	2010	11	£961.28
£26,301.75	19.10.2010	2010	9	£1052. 07
£9086.79	19.11.2010	2010	7	£363.47
£14,849.65	19.12.2010	2011	2	£593.99
£19,484.67	19.01.2011	2011	5	£779.39
£19,715.99	19.02.2011	2011	9	£788.64
£40,252.71	19.03.2011	2011	9	£1610.11
£0	19.04.2011	2011	0	£0
£223,835.36		TOTALS		£8,953.41

7**.** HMRC assessed the penalty at the 4% and notified it to the Appellant in a letter dated 3rd of August 2011. Following a request for a review the penalty was confirmed in a letter from HMRC of 29th November 2011. The Appellant appealed to the Tribunal on 29th of December 2011.

8. The Appellant's grounds of appeal in its notice of appeal to the Tribunal and in letters to HMRC were:

1. The fine is unjust and disproportionate particularly for some of the months in which penalties were raised given the relative modest delays in payment. In every month except month five the payments were less than 10 days late and on 5 occasions, only five or less days late.
2. On numerous occasions in the PAYE default year the Appellant had discussions with the local tax office to discuss the PAYE and NIC payments. The Appellant says that despite this on-going dialogue, it was never informed by HMRC that penalties would be raised in respect of late payments.
3. The Appellant denied having received HMRC's initial letter of 28 May 2010, which followed the first default, and warned of the possibility of penalties. The first the proprietors knew about the penalties was 14 months after the first late payment (which was only two days late) in August 2011, when they received the penalty notice decision. The Appellant says it should have received a penalty at that time, which would have given it the opportunity of reviewing its procedures and avoiding further late payments. The Appellant argues that, to defer a penalty until over a year after the first breach hardly acts as a deterrent.

4. During the year 2010 – 11 the Appellant suffered £100,000 of bad debts which impacted greatly on the business and its ability to make PAYE payments on time. This was entirely beyond the company's control and therefore a reasonable excuse for late payment. The Appellant had no control over debtors some of which into Administration. It is unfair for HMRC to state in the internal review decision that this should not have affected the Appellant's ability to pay simply because there had been late payments in previous years.

5. It is unreasonable and unfair that lack of funds may be accepted as an excuse when asking for a time to pay arrangement, but not when a penalty has been charged. It cannot be reasonable that the same penalty is levied against a company which only pays five days late and another company which pays five months late. The penalty regime and its method of operation should be much fairer and more open and transparent.

The legislation

9. The relevant legislation is contained in Finance Act 2009, Schedule 56.

Paragraph 1 of Schedule 56 states as follows:

'(1) A penalty is payable by a person ("P") where P fails to pay an amount of tax specified in column 3 of the Table below on or before the date specified in column 4.

(2) Paragraphs 3 to 8 set out—

(a) the circumstances in which a penalty is payable, and

(b) subject to paragraph 9, the amount of the penalty.

(3) If P's failure falls within more than one provision of this Schedule, P is liable to a penalty under each of those provisions.

(4) In the following provisions of this Schedule, the "penalty date", in relation to an amount of tax, means the date on which a penalty is first payable for failing to pay the amount (that is to say, the day after the date specified in or for the purposes of column 4 of the Table)'.

10. The table lists numerous various categories of taxes of which those referred to in items 1 and 2 (as shown in the extract from the Table below) are relevant to this appeal.

	Tax to which payment relates	*Amount of tax payable*	*Date after which penalty is incurred*
1	Income tax or capital gains tax	Amount payable under section 59B(3) or (4) of TMA 1970	The date falling 30 days after the date specified in section 59B(3) or (4) of TMA 1970 as the date by which the amount must be paid
2	Income tax	Amount payable under PAYE regulations ...	The date determined by or under PAYE regulations as the date by which the amount must be paid
3	Income tax	Amount shown in return under section 254(1) of FA	The date falling 30 days after the date specified in section 254(5) of FA 2004

		2004	as the date by which the amount must be paid

11. Regulations 67A and 67B of the Social Security Contributions Regulations (SI 2001/1004 as amended) provide that Schedule 56 applies also to Class 1 National Insurance contributions as if they were an amount of tax falling within item 2 of the above Table, and to Class 1A and Class 1B National Insurance contributions as if they were an amount of tax falling within item 3 of the above Table.

12. Paragraph 5 of Schedule 56 states that paragraphs 6 to 8 of Schedule 56 apply in the case of a payment of tax falling within item 2 or 4 in the Table.

13. Paragraph 6 of Schedule 56 states as follows:

(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 (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--

(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);

(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 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 penalty is 3% of the amount of the tax comprised in the total of those defaults.

(7) If P makes 10 or more defaults during the tax year, the amount of the penalty is 4% of the amount of the tax comprised in the total of those defaults.

(8) For the purposes of this paragraph--

(a) the amount of a tax comprised in a default is the amount of that tax comprised in the payment which P fails to make;

(b) a default counts for the purposes of sub-paragraphs (4) to (7) even if it is remedied before the end of the tax year.

(9) The Treasury may by order made by statutory instrument make such amendments to sub-paragraph (2) as they think fit in consequence of any amendment, revocation or re-enactment of the regulations mentioned in that sub-paragraph.

14. Paragraph 9 of Schedule 56 allows HMRC to reduce a penalty if special circumstances exist.

Paragraph 9 states as follows:

(1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.

(2) In sub-paragraph (1) "special circumstances" does not include--

(a) ability to pay, or

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to--

(a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty.

15. Paragraph 10 of Schedule 56 states as follows:

(1) This paragraph applies if--

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

(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").

(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.

(3) But if--

(a) P breaks the agreement (see sub-paragraph (4)), and

(b) HMRC serves on P a notice specifying any penalty to which P would become liable apart from sub-paragraph (2),

P becomes liable, at the date of the notice, to that penalty.

(4) P breaks an agreement if--

(a) P fails to pay the amount of tax in question when the deferral period ends, or

(b) the deferral is subject to P complying with a condition (including a condition that part of the amount be paid during the deferral period) and P fails to comply with it.

(5) If the agreement mentioned in sub-paragraph (1)(c) is varied at any time by a further agreement between P and HMRC, this paragraph applies from that time to the agreement as varied.

16 Paragraph 11 states in mandatory terms that HMRC must levy a penalty where P is liable:

11(1) Where P is liable for a penalty under any paragraph of this Schedule HMRC must-

(a) assess the penalty,

(b) notify P, and

(c) state in the notice the period in respect of which the penalty is assessed.

17. Paragraphs 13-15 of Schedule 56 provide for appeals to the Tribunal against a decision of HMRC that a penalty is payable, or against a decision by HMRC as to the amount of the penalty that is payable. The Tribunal's powers are laid down in paragraph 15:

15(1) On an appeal under paragraph 13(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 13(2) that is notified to the tribunal, the tribunal may--

(a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had power to make.

(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 9--

(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 9 was flawed.

(4) In sub-paragraph (3)(b) "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.

(5) In this paragraph "tribunal" means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 14(1)).

18. As observed in *Dina Foods Limited*, [TC01546] under paragraph 15 the Tribunal is given power:

‘to confirm or cancel the penalty, or substitute for HMRC's decision another decision, but only one that HMRC had the power to make. The Tribunal can only rely upon the "special circumstances" provision in paragraph 9 to a different extent than that applied by HMRC if it thinks that HMRC's decision in that respect was flawed. Applying judicial review principles, the Tribunal must consider whether HMRC acted in a way that no reasonable body of commissioners could have acted, or whether they took into account some irrelevant matter or disregarded something to which they should have given weight. The Tribunal should also consider whether HMRC have erred on a point of law.’

19. Under paragraph 16 of Schedule 56, the Appellant may escape liability for a penalty if the Tribunal is satisfied that there was a reasonable excuse. Paragraph 16 was amended by Schedule 11 of the Finance (No 3) Act 2010 (c,33). As originally drafted, paragraph 16 provided that liability to a penalty did not arise in relation to any failure for which there was a reasonable excuse. In the amended version, the paragraph also went on to say: "the failure does not count as a default for the purposes of paragraph 6...". The effect of this change is therefore that under the amended legislation, it is clear that defaults for which there is a reasonable excuse are not to be counted when fixing the appropriate rate of penalty to be charged.

Paragraph 16 of Schedule 56 states as follows:

(1) If P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for a failure to make a payment-

(a) liability to a penalty under any paragraph of this Schedule does not arise in relation to that failure, and

(b) the failure does not count as a default for the purposes of paragraph 6 ...

(2) For the purposes of sub-paragraph (1)--

(a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control,

(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and

(c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

20. In considering a reasonable excuse the Tribunal examines the actions of the Appellant from the perspective of a prudent taxpayer exercising reasonable foresight and due diligence and having proper regard for its responsibilities under the Taxes Acts.

21. The operation of Schedule 56 was considered in *Dina Foods*. It was observed that:

‘(1) the legislation became operative with a commencement date of 6 April 2010, so that the first time penalties could be raised under these rules was after the end of the 2010/11 tax year, given the way that the penalties talk in terms of the number of defaults during the year in question (at [11]);

(2) except in the case of special circumstances, the scheme laid down by the statute gives no discretion: the rate of penalty is simply driven by the number of PAYE late payments in the tax year by the employer (at [31]);

(3) the scheme of the PAYE legislation requires taxpayers to pay over PAYE on time; the legislation does not require HMRC to issue warnings to individual employers, though it would be expected that a responsible tax authority would issue general material about the new system (at [33]);

(4) lack of awareness of the penalty regime is not capable of constituting a special circumstance; in any event, no reasonable employer, aware generally of its responsibilities to make timely payments of PAYE and NICs amounts due, could fail to have seen and taken note of at least some of the information published and provided by HMRC (at [37]);

(5) any failure on the part of HMRC to issue warnings to defaulting taxpayers, whether in respect of the imposition of penalties or the fact of late payment, is not of itself capable of amounting either to a reasonable excuse or special circumstances (given that there is no separate penalty for each individual default, and the penalty can only be assessed once the aggregate of the late paid tax comprised in the total of the defaults for a particular tax year has been ascertained) (at [38]-[39]);

……

Evidence and submissions

22. HMRC's bundle of documents included copies of correspondence, computerized records of telephone attendance notes and HMRC notices, together with the materials by which the new penalty system had been publicised.

23**.** It was not in dispute that the Appellant was required throughout the relevant year to make monthly payments of PAYE and NICs by the 19th day of each month. Nor was there any dispute between the parties as to the amount of PAYE and NIC required to be paid by the Appellant in each of the months in question. It was accepted by the Appellant that each of the payments in respect of which a penalty has been imposed was indeed late. There was also no dispute as to the method of calculation of the penalties apart from the potential application of paragraphs 9 and 16 of Schedule 56.

24**.** HMRC produced for the hearing a revised penalty notice dated 12th April 2012. This revised penalty notice revised the amount of the penalty previously imposed to take account of corrections that were necessary and the decision in *Agar Ltd v Revenue & Customs* [2011] UKFTT 773 (TC). The revised penalty was calculated on the basis that the effect of *Agar* is that the 12th penalty should not have been included in the penalty notice, as the Appellant did not become liable to it until after the end of the tax year in question. Consequently the original penalty total of £9,045.63 was reduced to £8,953.41

The Appellant's submissions

25. Miss Clapham for the Appellant said that monthly reminders issued in respect of late payments never mentioned either that penalties had already been incurred or that further penalties would accumulate and the percentage rate of penalty increase with the number of defaults. She said that the Appellant was unaware that the PAYE penalty regime was changing.

Miss Clapham argued that, given Miss Bartup's submissions that HMRC was obliged to issue penalties where defaults have occurred, HMRC would have known, at the time of the first late payment which counted as a default, that there would be a penalty. She therefore argued that HMRC should at that time have informed the Appellant that a penalty had been incurred and that any further defaults would incur a penalty. She said that in telephone calls, HMRC only ever mentioned that they had the right to impose penalties. The Appellant was never told that penalties *would* be imposed. If the only reason HMRC were not obligated to issue penalties as when they occurred, was that until the end of the year HMRC would not know how many defaults there were or whether there had been any 'special circumstances', then all of this should have been explained to the Appellant. Ms Clapham said that the company had no record of having received HMRC's notification of 28 May 2010.

26. Miss Clapham accepted that HMRC did not have a legal duty to be proactive in warning taxpayers of a change in the PAYE penalty regime. However, she said that because HMRC never mentioned penalties, even when they were being incurred on a regular basis, this was very unfair conduct by HMRC. The fact that penalties were not raised and pursued until several months after the tax year end was also unfair, given that HMRC knew that under the new legislation it had an obligation to raise penalties. She says that the Appellant was totally unaware of the way the new penalty regime operated. She accepted that the Appellant had received a number of notices and reminders from HMRC but assumed that because the Appellant was making regular payments of PAYE, HMRC had decided against raising any kind of penalty or interest charge and that there was therefore no problem.

27. Miss Clapham said that the company suffered exceptional bad debts in the year 2010 – 11 which created financial difficulties and cash flow problems. The problems caused by this were entirely out of the Appellants control. She said HMRC seem to understand the company's difficulties and never once mentioned that substantial penalties would be payable at the end of the year.

28. Miss Clapham referred to the case of *HMD Response International*, where the First-Tier Tribunal decided that an employer had a reasonable excuse for the late submission of its P35 and cancelled a penalty that had been imposed by HMRC. She said she understood the principle adopted by the Tribunal to be that if a taxpayer, wrongly but innocently believes that it is operating within the law, HMRC have a duty to act reasonably and ensure that the taxpayer is fully aware of any changes in legislation.

29. Payments are now made electronically and there have been no late payments since August 2011.

<u>HMRC's submissions</u>

30. Miss Bartup submitted that the Appellant had no reasonable excuse for the late payment of the PAYE. She submitted that under paragraphs 11 of Schedule 56 HMRC had no discretion as to the imposition of the penalty. She submitted that the amount of the penalty was set down in paragraph 6 of Schedule 56 and if the tax payer paid late, HMRC were obliged to impose a penalty. She said that in the first year of the penalty regime HMRC had targeted taxpayers who were the most persistent defaulters. This was what was meant by the selection of taxpayers on a risk-assessed basis. Miss Bartup confirmed that in 2011–12 the Appellant was late only for the first five months. After that, there had been no defaults. Miss Bartup said that the Appellant had been late paying PAYE in previous tax years on a regular basis and therefore could not say that

the defaults in 2010 – 11 were as a result of exceptional bad debts. In any event the company had made significant profits that year compared to previous years.

31. Miss Bartup submitted that lack of awareness of the penalty regime was not a 'special circumstance'. She said that HMRC publicised the late payment penalties for PAYE and NICs extensively both before and after they came into effect. An employer pack including a CD-ROM was mailed to all employers in February 2010, flyers were mailed to employers and factsheets were distributed at face to face events (such as "Employer Talk" and published on the HMRC website). Late payment penalties also featured in issues of Employer Bulletin, on the PAYE pages of the website (and on a podcast), on Businesslink and in published guidance and employer help books. There was also communication with accountants and other tax agents, and publication in local and national media. HMRC's Employer Bulletins refer employers to HMRC's website.

32. Miss Bartup said that the Appellant was sent a letter on 28 May 2010 advising that the payment had been late, that any further late payments may incur a penalty, and giving an internet address at which further information about the penalty regime could be found. She said the website makes the deadlines for payment quite clear. The website says:

> '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.
>
> PAYE/Class 1 NICs postal payment deadlines
>
> .....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.'

33. Miss but said that the case of HMD Response International was decided on entirely different issues and legislation. In any event, each case as to whether or not there is been a reasonable excuse must be decided on its merits.

Conclusion

34. At the end of the hearing the Tribunal reserved its decision which now follows.

35. We accept that the Appellant's late payments were mainly due to the proprietors not being aware of the way the new penalty regime was working. However, this does not qualify as a reasonable excuse. Since the imposition of the penalties, the Appellant's PAYE and NIC have been paid on time, which clearly suggests that the Appellant has put in place measures to ensure the payments are made within the time limits. As Miss Clapham said during the hearing, if the Appellant been fully aware of the new penalty regime, it would have dispatched the PAYE and NIC payments to HMRC sooner than it had been doing. This was therefore clearly an option, which the proprietors of the company should have considered earlier than they did, particularly given that they were informed of the possibility of penalties being incurred.

36. HMRC were not under any statutory duty to warn the Appellant of the change in the penalty regime and the potential penalties. The legislation does not require HMRC to issue warnings to individual employers. It is settled law that that any failure by HMRC to give warning of the penalty regime, cannot provide a reasonable excuse. The obligation is to make payment by the due date – see *Rodney Warren & Co* [2012] UKFTT 57 (TC) and *Dina Foods Limited* above.

37. The Tribunal is satisfied that there was an extensive campaign of advance publicity and that there was no reason why Appellant should not have been sufficiently alerted. The Appellant's apparent lack of awareness of the new penalty regime is not capable of constituting a special circumstance or reasonable excuse.

38. The Appellant received an initial Penalty Default Warning letter in May 2010 (which explained about time to pay arrangements) and numerous enforcement warning letters. The Appellant says that it did not receive the initial warning letter. However, it was correctly addressed and our finding is that the company must have received the letter. In any event the Appellant should have been aware of the change in legislation and the prospect of penalties in the event of any default of its obligation to pay PAYE and NIC on time. As the Appellant accepts here was a considerable amount of contact with HMRC throughout the year about late payments of PAYE. There were also several telephone conversations with the company. A reasonably prudent employer, aware of its responsibilities to make timely payments of PAYE and NICs amounts, would have been prompted to make full enquiries and obtain information about the new penalty regime.

39. On the evidence, we accept that in letters and telephone conversations which followed the initial warning letter, the Appellant was not told in unequivocal terms that it had already incurred penalties. As the Appellant says, had HMRC informed the Appellant that a penalty or penalties had already been incurred following the first late payment that counted as a default, steps could have taken to reduce or eliminate the possibility of further defaults. Nonetheless this does not absolve the Appellant of its liability to penalties. In any event as HMRC say it is only when the end of the tax year has elapsed that HMRC can consider whether a penalty has been triggered and only then can they consider, whether special circumstances exist or whether there is a reasonable excuse for late payment.

40. In *Dina Foods*, at [40]-[42], the Tribunal considered whether the penalty was disproportionate, and said as follows:

> '40. In its initial appeal letter and in its formal notice of appeal, the company referred to the penalty being excessive. It is clearly not excessive on the terms of Schedule 56 itself because the system laid down prescribes the penalties. Nonetheless, whilst no specific argument was addressed to us on proportionality, we have considered whether, in the circumstances of this case, the 4% penalty that was levied on the total of the relevant defaults in the tax year can be said to be disproportionate.
>
> 41. The issue of proportionality in this context is one of human rights, and whether, in accordance with the European Convention on Human Rights, Dina Foods Ltd could demonstrate that the imposition of the penalty is an unjustified interference with a possession. According to the settled law, in matters of taxation the State enjoys a wide margin of appreciation and the European Court of Human Rights will respect the legislature's assessment in such matters unless it is devoid of reasonable foundation. Nevertheless, it has been recognised that not merely must the impairment of the individual's rights be no more than is necessary for the attainment of the public policy objective sought, but it must also not impose an excessive burden on the individual concerned. The test is whether the scheme is not merely harsh but plainly unfair so that, however effectively that unfairness may assist in achieving the social objective, it simply cannot be permitted.
>
> 42. Applying this test, whilst any penalty may be perceived as harsh, we do not consider that the levying of the penalty in this case was plainly unfair. It is in our view clear that the scheme of the legislation as a whole, which seeks to provide both an incentive for taxpayers

> to comply with their payment obligations, and the consequence of penalties should they fail to do so, cannot be described as wholly devoid of reasonable foundation. We have described earlier the graduated level of penalties depending on the number of defaults in a tax year, the fact that the first late payment is not counted as a default, the availability of a reasonable excuse defence and the ability to reduce a penalty in special circumstances. The taxpayer also has the right of an appeal to the Tribunal. Although the size of penalty that has rapidly accrued in the current case may seem harsh, the scheme of the legislation is in our view within the margin of appreciation afforded to the State in this respect. Accordingly we find that no Convention right has been infringed and the appeal cannot succeed on that basis'.

We agree with the observations made in *Dina Foods* as set out above. The principles were endorsed by the recent Upper Tribunal decision in *Total Technology (Engineering).* We do not consider the penalties to be disproportionate to the defaults involved.

41. As stated in *Dina Foods,* the penalty regime may be harsh in order to act as a deterrent, but it is not "unfair". The penalty scheme as laid down by the statute provides no discretion (except where "special circumstances" apply, which was not suggested here). The penalty rate rises in accordance with the incidence of default and is a fixed percentage. The penalty cannot be excessive where it was correctly assessed and calculated. We therefore follow *Dina Foods Limited*, at [40] to [42], and *Agar* at [46] and find that the penalties raised were not disproportionate.

42. The Tribunal's jurisdiction, on appeal against fixed penalties, was considered by the Upper Tribunal in *Hok Ltd*, where it was confirmed that the Tribunal's power is limited to correcting mistakes. It may decide that HMRC were wrong in deciding that a penalty was due and discharge it; or it may decide that HMRC imposed a penalty of the wrong amount, and replace it with the correct amount. However, the Tribunal does not have a power to substitute an amount other than the correct amount, whether on the basis of fairness or otherwise. Thus if HMRC have imposed a penalty in circumstances where one is due, and the penalty imposed is of the correct amount, there is nothing the Tribunal is permitted to do. No such power is granted by statute and none arises under the general or common law. Similarly with regard to the possible existence of 'special circumstances,' although s9 states that HMRC 'may' reduce a penalty, thus affording the Commissioners some discretion, there is no mechanism by which the Tribunal may review the exercise of that discretion. The discretion to mitigate a penalty is conferred on HMRC, but not on the Tribunal, and the legislation does not provide any mechanism by which the refusal of HMRC to exercise that discretion under s 9 may be challenged before the First-tier Tribunal.

43. For the above reasons the Tribunal finds that the Appellant has not established a reasonable excuse for any of the late payments, or that there were special circumstances justifying a mitigation of the penalty. The penalty was not disproportionate and the administration of the penalty regime was not unfair to the Appellant. It therefore follows that the appeal must be dismissed and the penalties confirmed.

44. 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.

MICHAEL S CONNELL

TRIBUNAL JUDGE

RELEASE DATE: 10 January 2013