[2013] UKFTT 107 (TC)

TC02525

Appeal number: TC/2012/07027

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

RED BOX RECORDERS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE MICHAEL S CONNELL
BEVERLEY TANNER

Sitting in public at 4th Floor Byron House Maid Marion Way Nottingham on 23 October 2012

Mr. Aian Worthington, Director of the Appellant Company

Mr. Oborne, Officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal against a penalty assessment (as amended) of £11,118.86 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 dates and amounts of the PAYE payments due and made were not in dispute. The appeal was based on whether the Appellant had a 'reasonable excuse'. The Appellant also argued that it was unaware of the new penalty regime. The Appellant also argued that the penalties were disproportionate and arbitrary.

Background

3. The Appellant supplies digital voice recording software, call management, recording platforms and audio analytics. The company is based in Nottingham

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 has 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, and that each payment was made as soon as the reasonable excuse ended. Reasonable excuse is not defined by legislation, but it can be considered to be an event or events beyond the taxpayer's control which prevented the payments being made by the due date.

6. The Appellant was late in paying its monthly PAYE and NICs to HMRC eleven months in the 2010 -11 tax year. The first default month is disregarded and following the decision in *Agar* any default in month twelve does not crystallise in the default year 2010 – 11, but instead falls in the year 2011-12. Therefore there were nine defaults. 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 nine 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%
£59,319.40	19.05.2010	25 May 2010	4	disregarded
£23,752.70	19.06.2010	28 June 2010	6	£712.58
£27,132.30	19.07.2010	28 July 2010	6	£794.90
£59,853.10	19.08.2010	27 August 2010	7	£1795.59
£29,389.87	19.09.2010	28 Sept 2010	6	£881.70
£28,379.95	19.10.2010	28 October 2010	6	£851.40
£76,329.06	19.11.2010	26 Nov 2010	4	£2289.87
£0	19.12.2010	17. Dec2011	0	£0
£35,243.18	19.01.2011	28 Jan 2011	7	£1057.30
£55,388.25	19.02.2011	28 Feb 2011	6	£1661.65
£35,796.25	19.03.2011	28 March 2011	6	£1073.89
£0	19.04.2011	2011	N/A	£0
£431,569.25		TOTALS		£11,118.88

7**.** HMRC assessed a penalty at 3% of the total amount of defaults and notified it to the Appellant in a letter dated 29 November 2011. The Appellant asked HMRC for an independent review. By letter dated 11 the May 2012 HMRC confirmed the decision. The Appellant appealed to the Tribunal on 29 May 2012

8. The arguments in the Appellant's Notice of Appeal and letters to HMRC were that:

1. The penalties incurred are unfair and disproportionate. There is no link between the quantum of the penalty and the period of delay.
2. There is no possibility of mitigation of the penalty, and no upper limit to the amount of any penalty, which could be charged. The penalties are therefore excessive.

<u>The legislation</u>

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 2004	The date falling 30 days after the date specified in section 254(5) of FA 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 19^{th} day of each month. Nor was there any dispute between the parties as to the amount of PAYE and NIC 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 calculation of the penalties apart from the potential application of paragraphs 9 and 16 of Schedule 56

The Appellants submissions

24 Mr. Worthington reiterated and expanded upon the grounds of appeal stated in the Notice of Appeal to the Tribunal. These can be summarised as follows

1. HMRC failed to notify the Appellant that it might be liable for penalties if its PAYE was paid late. The Appellant had not received any information relating to the new penalty scheme. He said that it is not unreasonable, given the significant changes in the penalty regime, to have expected the letters from HMRC to include a reference to the likelihood of penalties in the event of any defaults.

2. The Appellant may have been a few days late in its PAYE payments but it had never missed a payment. Payments were only between 4 to 6 days late. The penalties are unfair and totally disproportionate to the relative modest delays that had occurred in PAYE payments. The payments were never more than seven days late. He considered the penalties to be entirely disproportionate to any costs incurred by HMRC.

3. Mr. Worthington said that the new penalty regime does not distinguish between a company which, for example, pays its PAYE only a few days late in each month and another company which pays its PAYE very late in say the first three or four months of the year and then paid on time. He produced two examples to show that the former (based on the Appellants PAYE payment record) paid a substantially higher penalty than the latter. The Appellant company had defaulted on a total sum during the year of £370,620.90 and the delay amounted to 61 days, which resulted in a penalty of £11,118.86. In his second example the other company had defaulted on a total sum of £110,102 and the delay amounted to 610 days but only incurred a penalty of £1101. He argued that the penalty regime was plainly unfair in excessively penalising employers who may have been only one or two days late with their payments. Employers who were many months late in paying PAYE incurred exactly the same penalty.

HMRC's submissions

25. MR. Oborne for HMRC said that the Respondents accepted that the onus is on them to show default, but as the Appellant had accepted the payments were late it was for them to show why the penalty should not be charged and that the standard of proof is on the balance of probabilities.

26. Mr. Oborne submitted that the Appellant had no reasonable excuse for the late payment of the PAYE. He submitted that under paragraphs 11 of Schedule 56, HMRC had no discretion as to the imposition of the penalty. He 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 the penalty. He said that in the first year of the penalty regime HMRC had targeted taxpayers who were the most persistent defaulters on a risk-assessed basis.

27. Mr. Oborne submitted that lack of awareness of the penalty regime was not a special circumstance. He 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. He said that this should have acted as an early warning to the Appellant

that the penalty regime was about to change. HMRC made every effort to educate employers on the changes. 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. The website makes the deadlines for payment quite clear:

> '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.'

28. Mr. Oborne said that the Appellant was sent a warning letter on 28 May 2010 advising that the payment had been late, that any further late payments might incur a penalty, and giving an internet address at which further information about the penalty regime could be found. HMRC were not able to produce a copy of the original letter as it was a computer-generated letter, which had not been copied. However he was able to produce a copy of the format of the letter, which warned that, continued late payment could result in a penalty being charged. As referred to above the letter gave links to various web pages were more information could be obtained. The letter also included an offer to sign up to receive e-mail alerts as due dates approach, and informs the addressee to contact the business payment support service in the event of the employer being unable to pay PAYE on time.

29. Mr. Oborne said that HMRC had achieved well over hundred pieces of media coverage in national trade, regional and online press. The Appellant gave the general economic climate as a reason for its insufficiency of funds and as a reasonable excuse for late payments. However, this date back at least two years prior to the start of the default year and HMRC submit that it is reasonable to expect the Appellant by April 2010 to have put measures in place to ensure that PAYE was paid on time.

30. Mr. Oborne said that the examples produced by Mr. Worthington were entirely artificial

Conclusion

31. At the end of the hearing, after consideration, the Tribunal dismissed the appeal for the following reasons

32. HMRC were not under any statutory duty to seek to warn the Appellant of change and 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.

33. 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.

34. 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 first

default would have attracted no penalty if there had been no further defaults for the remainder of the tax year. A reasonably prudent employer, aware of its responsibilities to make timely payments of PAYE and NICs amounts, would have been prompted to make enquiries of HMRC to ascertain the cause of the problem and obtain information about the penalty regime.

35**.** 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.

36. 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.

37. 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.

38. For the above reasons the Tribunal found that the Appellant had not established either a reasonable excuse for any of the late payments, or shown 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.

39**.** 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: 7 February 2013