



TC03083

Appeal number: TC/2013/01504

Penalty – late payment of PAYE and NICs – FA 2009 Schedule 56 – whether lack of specific warning of penalties a reasonable excuse – no – whether any special circumstances existed to justify a reduction in the penalty amount – no – whether the penalty was disproportionate – no – whether a reasonable excuse for late payment – no – Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

HIRST KIDD & RENNIE LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE MICHAEL S CONNELL
TIM RATCLIFFE**

Sitting in public at Alexandra House, The Parsonage, Manchester on 1 July 2013

The Appellant did not attend and was not represented

Mr Morgan, Officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

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1. This is an appeal against a penalty assessment of £16,559.34 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 ten months of the year ending 5 April 2012.

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2. The Appellant did not attend the hearing and was not represented. The Appellant’s accountants had previously written to the Tribunal to say that they had intended to represent the Appellant, but on the instructions of their client, after reviewing relevant case law precedent, would not be attending the hearing. The Tribunal was satisfied that it was in the interests of justice to proceed.

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3. It was clear from the Appellant’s correspondence with HMRC that the amounts of the PAYE payments made late were not in dispute. The issue was whether the Appellant had a “reasonable excuse”. The Appellant argued that:

i) the penalty was disproportionate and unfair.

ii) The penalty was late.

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iii) there had been no warning of the likely severity of the penalty.

iv) the company may have been late by a few days in making PAYE payments, but had never defaulted

Background

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4. The Appellant company was formed 158 years ago and operates a newspaper publishing business. It is based in Oldham, Greater Manchester.

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5. From 6 April 2010, a new penalty regime was introduced for late payment of monthly PAYE and NIC by employers. Under Schedule 56 Finance Act 2009, penalties are imposed for late payment of PAYE. The legislation in relevant part is set out below.

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6. 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.

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7. The Appellant was late in paying its monthly PAYE and NICs to HMRC for every month in the 2011-12 tax year. 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.

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PAYE and NIC not paid on time	Due Date	Days Late/final balance paid
£38,822.82	19.05.2011	2
£43,030.04	19.06.2011	1
£42,177.14	19.07.2011	3
£41,480.27	19.08.2011	1
£40,195.15	19.09.2011	1
£52,344.05	19.10.2011	2
£39,000.39	19.11.2011	3
£39,713.23	19.12.2011	10
£40,011.75	19.01.2012	4
£39,500.55	19.02.2012	2
£36,525.13	19.03.2012	4
TOTAL £		

8. HMRC assessed a penalty at the 4% rate and notified it to the Appellant in a letter dated 7 August 2012. Following confirmation of the penalty on review by HMRC on 1 November 2012 the Appellant appealed to the Tribunal on 3 December 2012. The grounds of appeal in the notice of appeal were that :

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(a) The Appellant had received no warnings that a penalty would be applied for the PAYE defaults and in particular had received no indication that penalties would reach “such proportions” and this was “after contact

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with HMRC staff on a face-to-face basis when HMRC's system misallocated funds; telephone conversations on other matters"; and "a recent PAYE audit which gave the Appellant a clean bill of health and no indication that it was not compliant."

5 (b) HMRC literature indicated that a penalty *may* be due after three late
payments. It was unreasonable therefore for HMRC to wait for more late
payments and then to apply a longer retrospective penalty when an earlier
penalty notice with penalties quantified would have ensured subsequent
10 prompt payments. The Appellant said that this could be interpreted as a
cynical act by HMRC to extract an increased penalty from a substantially
compliant company.

(c) The penalty bears no relation to the misdemeanour. The Appellant
operated in an industry that was struggling to compete and survive in what
had been recognised as officially the worst recession for over sixty years.
15 It would be difficult for the Appellant to take the burden of such a high
penalty. The penalty amounted to a typical employee's annual salary and
it was simply unrealistic to suggest that it was not totally disproportionate
to the modest delays which had occurred. The company was loss making
and the penalty would result in laying off staff. In fact, the Appellant had
20 already started the process of implementing redundancies.

(d) The company secretary Mr. Bernard Stone said that he would
personally take responsibility for dealing with returns in the future, so
HMRC could be confident that the problem would not re-occur.

25 The legislation

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

Paragraph 1 of Schedule 56 states as follows:

30 '(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.

35 (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.

40 (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.

45 (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.

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	<i>Tax to which payment relates</i>	<i>Amount of tax payable</i>	<i>Date after which penalty is incurred</i>
<i>PRINCIPAL AMOUNTS</i>			
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.

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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:

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(1) P is liable to a penalty, in relation to each tax, of an amount determined by reference to--

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(a) the number of defaults that P has made during the tax year (see subparagraphs (2) and (3)), and

(b) the amount of that tax comprised in the total of those defaults (see subparagraphs (4) to (7)).

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(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--

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(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);

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(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.

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(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.

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(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.

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(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;

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(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.

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(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.

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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.

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(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.

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(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.

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15. Paragraph 10 of Schedule 56 states as follows:

- 5 (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").
- 10 (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.
- 15 (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.
- 20 (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
25 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.

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

- 35 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.

40 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:

- 45 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.

5 (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
- 10 (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.

15 (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:

20 '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

25 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.'

30 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

35 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.

40 20. 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

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- (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.

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

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

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‘(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]);

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(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]);

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(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]);

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(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]);

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(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]);

5 Evidence and submissions

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

10 24. As stated above, it was not in dispute that the Appellant was required throughout the relevant year to make monthly payments of PAYE and NICs by the nineteenth 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
15 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.

25. The penalty schedule took into account the decision in *Agar Ltd v Revenue & Customs* [2011] UKFTT 773 (TC) to the effect that the penalty for the twelfth month
20 is not included in the penalty notice, as the Appellant did not become liable to it until after the end of the tax year in question

The Appellant's submissions

26. The Appellant's accountants, Messrs Dunhams, said in correspondence with HMRC that their client had no record of having received the penalty default notice
25 which HMRC say was issued on 27 May 2011, after the initial default.

27. This was the first tax year where the Appellant's PAYE payments had been marginally overdue. The defaults coincided with changes to the Appellant's monthly revenue collections from direct delivery newsagents. They were now collected by direct debit on or around 23/24 of each month. This was a departure from the previous
30 more frequent payments. Also, as newsagents were declining in numbers, direct delivery was taking over and therefore cash income was more concentrated on or around these dates.

28. HMRC said, in a telephone conversation with the Appellant on 20 December 2011, that late payment penalties *may* be charged. At that stage the Appellant had
35 already been late paying seven PAYE payments and yet there was no mention by HMRC that the Appellant had already incurred a 3% penalty, amounting to more than £10,000. It was quite wrong for HMRC to say that a penalty *may* be incurred when in fact a substantial penalty had *already* been incurred. If the position had been brought to the Appellant's attention in December 2011, some form of action would have been
40 undertaken, thus avoiding a 4% penalty at the end of the year.

29. In the case of self-assessment, a warning is given by HMRC before twenty-eight days is reached if payment has not been made, thereby allowing the tax-payer to make the payments before penalties are charged. The Appellant asks whether HMRC is therefore favouring one taxpayer against another.

HMRC's submissions

30. Mr. Morgan submitted that the Appellant had no reasonable excuse for the late payment of the PAYE. He submitted that under paragraph 11 of Schedule 56 HMRC had no discretion as to the imposition of the penalty. He said 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. In the first year of the penalty regime HMRC had targeted tax-payers who were the most persistent defaulters.

31. Mr. Morgan submitted that the initial warning letter stated that 'the penalty may be charged' because a penalty would not have been charged if the tax-payer had a reasonable excuse for any of the late payments or if special circumstances existed

32. Mr. Morgan submitted that any 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. 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.'

33. The Appellant's statement that it had not previously defaulted was incorrect. The Appellant was late on ten occasions in the previous year (only months five and six were paid on time). As the Appellant had paid late in the year, a penalty warning default letter was issued on 28 May 2010 after the first default. Despite this the Appellant continued to pay late, and further penalty warning letters were issued on 28 May 2011, 30 May 2012 and 28 June 2012. The penalty letters were all sent to the Appellant at 172 Union Street, Oldham. None had been returned as being 'undelivered'.

34. HMRC had to wait until the tax year ended to review the payments made and to see if there were any months in which the Appellant had a reasonable excuse for the late payment and also to calculate what percentage rate should be used in respect of the defaults. There could have been reasons why a penalty was not chargeable, for example, if there was a time to pay arrangement in place.

Conclusion

35. At the end of the hearing the Tribunal gave its decision for reasons which now follow.

5 36. The adverse trading circumstances affecting the Appellant and other factors
which contributed to the late payments were not in question. We accept that the
Appellant was experiencing financial difficulties over the period of default. However,
as clearly stated in paragraph 6(2)(a) of Schedule 56, an insufficiency of funds does
not qualify as a reasonable excuse. An inability to pay does not represent *special*
10 *circumstances* which might justify a reduction in a penalty. An exceptional or
unforeseen event which caused the insufficiency of funds may amount to a reasonable
excuse, but on the facts of this appeal there was no such event. Something specific,
unforeseen and related to the particular taxpayer is required. Adverse economic
conditions affecting business activity generally do not suffice. There were no
15 exceptional or unusual factors which might have caused the insufficiency of funds.

37. 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 any failure by HMRC to give
warning of the penalty regime cannot provide a reasonable excuse. The obligation is
20 to make payment by the due date – see *Rodney Warren & Co* [2012] UKFTT 57 (TC)
and *Dina Foods Limited* above.

38. 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
25 regime is not capable of constituting a special circumstance or reasonable excuse.

39. The Appellant would have received an initial Penalty Default Warning letter
in May 2011 (which also explained about time to pay arrangements) and subsequent
enforcement warning letters. There was a considerable amount of contact with HMRC
throughout the year about late payments of PAYE. There were a number of telephone
30 conversations with representatives of 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 enquiries of HMRC to obtain information about
the penalties that could be applied.

40. With regard to the issue of proportionality, in *Dina Foods*, at [40]-[42], the
35 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
40 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,
45 and whether, in accordance with the European Convention on Human

5 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
10 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,
15 however effectively that unfairness may assist in achieving the social
objective, it simply cannot be permitted.

15 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
20 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
25 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’.

30 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.

35 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. 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
40 [42], and *Agar* at [46] and find that the penalties raised were not disproportionate.

45 42. The Tribunal's jurisdiction on appeal against fixed penalties, as these are, 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.

5 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.

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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.

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MICHAEL S CONNELL

TRIBUNAL JUDGE

RELEASE DATE: 26 November 2013

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