TC02558

Appeal number: TC/2012/09858

INCOME TAX – Penalty for late payment of in-month PAYE – whether Time to Pay agreements were in place – whether the company reasonably believed that such agreements had been concluded – whether the company's cashflow difficulties were a reasonable excuse – whether the penalty was disproportionate generally – whether the penalty was disproportionate taking into account the possibility that it could have been reduced by a different allocation of the payments – whether the Tribunal had jurisdiction to consider whether the penalty was unfair – appeal dismissed and penalty confirmed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

BCE DISTRIBUTORS LIMITED **Appellant**

- and -

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

TRIBUNAL: ANNE REDSTON
(TRIBUNAL PRESIDING MEMBER)
TOBY SIMON

Sitting in public at 45, Bedford Square, London on 30 January 2013

Stuart Lacey, Managing Director of the Appellant, for the Appellant

Eleanor Gardiner, of HM Revenue & Customs Appeals and Reviews Unit for the Respondents

DECISION

1. This was the appeal by BCE Distributors Limited ("the company") against a penalty of £6,946.30 for late payment of monthly PAYE and National Insurance Contributions[1] during the year to 5 April 2012.

2. The Tribunal dismissed the appeal.

The issues in the case

3. The issues in the case were:

(1) whether the company had a time to pay ("TTP") agreement with HMRC for one or more of the months for which a penalty has been charged, and if not, whether it was reasonable for the company's staff to believe that an agreement was in place, so as to give the company a reasonable excuse;

(2) whether the company's cashflow difficulties provided a reasonable excuse for any of the late payments;

(3) whether the penalty was proportionate to the default, particularly taking into account the possibility that the penalty could be avoided or reduced by allocating the payments to different tax months;

(4) whether the Tribunal had jurisdiction to consider whether the penalty was "unfair", and if so, if it was unfair.

The legislation

4. The relevant legislation is at Finance Act 2009, Schedule 56. The penalty amounts are set out at para 6, as follows:

(1) if payments are late for one month in a tax year, there is no penalty;

(2) if two to four months' payments are late, the penalty is 1% of the total PAYE and NICs for the tax year;

(3) if five to seven months' payments are late, the penalty rises to 2%;

(4) if eight to ten months' payments are late, the penalty rises further to 3%;

(5) if eleven or twelve months' payments are late, the penalty is 4%.

5. However, following the case of *Agar v R&C Commrs* [2011] UKFTT 773 (TC) HMRC have accepted that the legislation does not allow a penalty to be charged for a late payment of month 12's PAYE.

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[1] For brevity, this decision refers to monthly PAYE payments, but should be read as referring also to payments of monthly NICs.

6. FA 2009, Sch 56, para 9 provides for the penalty to be reduced because of "special circumstances". HMRC had considered whether there were any special circumstances and decided that there were not. Mr Lacey did not contend otherwise. The Tribunal agrees that this paragraph did not apply on the facts of this case.

7. FA 2009, Sch 56, para 10 provides that a penalty is suspended "during currency of agreement for deferred payment". It reads as follows (where "P") stands for "person":

> (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.

8. FA 2009, Sch 56, para 16 sets out the "reasonable excuse" provisions:

> (1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a payment if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.
>
> (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.

9. FA 2009, Sch 56, para 11 reads:

(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.

The law on TTP agreements

10. This part of the decision sets out the Tribunal's understanding of the law on TTP agreements.

11. A TTP agreement may remove liability to a penalty under FA 2009, Sch 56, para 10(2) set out above.

12. However, this provision only eliminates the penalty for the period "between the date on which P makes the request and the end of the deferral period". It follows that an agreement made *after the due date* for payment cannot eliminate the penalty, because the trigger date for the penalty has already passed and the person has become already liable to the penalty. In the absence of a reasonable excuse or special circumstances HMRC "must" then assess the penalty (FA 2009, Sch 36, para 11).

13. If a TTP agreement is made *before the due date*, but the person does not keep to the terms of that agreement, then the penalty is payable if HMRC have served a penalty Notice (FA 2009, Sch 56, para 10(3)(a) and (4)).

14. Where the provisions of FA 2009, Sch 56 para 10 do not apply – perhaps because the person called HMRC after the due date – it may be the case that he reasonably believed he had negotiated a TTP agreement. This tribunal held, on the authorities, that a reasonable belief may be a reasonable excuse, see *Bellchambers v R&C Commrs* [2012] UKFTT 204(TC).

15. This was also the position in *Brady v R&C Commrs* [2011] UKFTT 415(TC), where Mr Brady provided documentary evidence of his conversations with HMRC. In *Thakrar v R&C Commrs* [2011] the tribunal found that while a reasonable and honest belief that a TTP agreement was in place potentially provided Mr Thakrar with a reasonable excuse, it found no evidence that he actually held such a reasonable belief.

16. However, it is well established that ignorance of the law is not a reasonable excuse. So simply a failure to understand how the legislation on TTP works does not constitute a reasonable excuse.

The evidence

17. The Tribunal was provided with:

(1) the correspondence between the parties;

(2) a summary of the company's monthly PAYE history for the years 2010-11 and 2009-10;

(3) HMRC's computer records showing the dates on which the company paid its PAYE in 2011-12, the issue of the penalty warning letter and the address to which it was sent;

(4) screenprints from HMRC's "Action History" for the company;

(5) screenprints from the 2010-11 PAYE CD Rom;

(6) sample penalty warning letters and other notices;

(7) extracts from HMRC Employer Bulletins and webpages giving information about the penalties for late paid monthly PAYE;

(8) a copy of HMRC's Budget Note BN90 dated 22 April 2009, announcing the new regime.

18. In addition, Mr Lacey gave oral evidence and was cross-examined by Mrs Gardiner.

Facts not in dispute

19. Based on the evidence provided, we found the following facts, none of which was in dispute.

20. The penalty regime was introduced from 6 April 2010. It was announced in Budget 2009 by way of a Budget Note (BN90). Further information was provided in the HMRC Employer Bulletins, issued in September 2009, April 2010, August 2010, February 2011 and February 2012, as well as on the HMRC website.

21. In the 2010-11 tax year, the company paid its PAYE on or before the due date for four of the first five months. In October 2010, the company's bankers withdrew its invoice discounting facility for one of the company's largest clients.

22. As a result, the PAYE for Month 6 (which was due on 19 October if paid by cheque and 22 October if paid electronically) was not paid until 11 January 2011: it was 84 days late. The payment for Month 7 (which was due on 19 November if paid by cheque and 22 November if paid electronically) was not paid until 21 December 2010: it was 29 days late. Payments for months 8 and 9 were made on time and those for months 11 and 12 were 4 and 3 days late respectively.

23. In the year 2011-12 PAYE was paid late every month. Six payments were between 3 and 6 days late, two were 9 days late, one was 11 days late, one 13 days late and one over a month late[2].

24. However, for Month 2 the company had contacted with HMRC before the due date and discussed the fact that the payment was going to be late. HMRC accepted that the conversation amounted to a TTP agreement and no penalty has been charged. The position for the other months is disputed. The parties' contentions are set out below, followed by the tribunal's findings.

Facts in dispute and TTP agreements

Generally

25. The company's TTP case rested on the timing and nature of the calls which had taken place between the company's staff (including Mr Lacey) and HMRC.

26. Mr Lacey said that at least some of the calls "would have" taken place before the due date, and that HMRC had agreed to a TTP arrangement. He did not have notes of the calls. In answer to questions from the Tribunal, he said that calls would not have taken place before the due date where the payment was going to be less than seven days late.

27. The company's appeal to the Tribunal states that:

> "had we been advised [by HMRC] what the likely penalties would be this would have focused our minds to ensure we were being compliant at all times even if it meant calling HMRC before the due date rather than 24 hours after the due date to inform HMRC payments would be late. Again we were not aware of the significance of calling before the due date rather than around the due date."

28. Ms Gardiner, relying on the company's 'Action History' record, did not accept there had been a TTP agreement for any month other than Month 2, where HMRC had already conceded the point.

29. She said (and the Tribunal accepted) that the Action History record was contemporaneous with the events recorded on it.

30. The screenprints of the Action History record as provided to the Tribunal cover the following periods:

(1) 23 May 2011 to 29 July 2011

(2) 23 October 2011 to 1 December 2011

(3) 23 to 28 December 2011

(4) 23 to 24 January 2012

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[2] When analysing the lateness of payments, the Month 12 payment (which was also late) has been ignored

(5) 23 to 24 February 2012

(6) 22 March 2012 to 30 March 2012.

31. The Tribunal asked Mrs Gardiner about the apparent gaps in the Action History record. She said that her understanding was that there were no conversations with the taxpayer during the gap periods. However, she agreed with the Tribunal that the Action History record set out all HMRC's actions relating to the taxpayer's PAYE record, such as the issue of estimated PAYE notices, and thus there was likely to be some information on the record for these months, even if no calls were made to or from the taxpayer.

32. We have commented on these gaps at the end of our decision.

Months which were less than seven days late

33. Mr Lacey said that no calls would have been made where the payment was less than seven days late. These were months 3, 4,5, 8 and 9. Neither party provided any evidence of calls taking place before the due date for any of these months. We find as a fact that no call was made in advance of the due date and so there was no TTP agreement existed. For the same reason, we find that the company's staff could not have believed that such an agreement existed.

Month 1

34. Month 1 was paid on 28 May 2011, 9 days late. No penalty was charged, because under FA 2009, Sch 56, para 6(3) no penalty is due for "the first failure" in a tax year.

35. Nevertheless, the Tribunal has to considered the Month 1 position, as if there was in fact no failure, the next default would escape a penalty.

36. HMRC's Action History record provided to the Tribunal begins at 23 May 2011, the day after the due date for electronic payment of PAYE and 4 days after the due date for payment by cheque. At 12.58 on that day, the Action History record says "no contact- BCE Distributors Ltd (Owner). Caller hung up just as call connected." On 25 May HMRC issued an estimated PAYE assessment (Form P101).

37. The Tribunal asked Mr Lacey if he remembered any contact in relation to Month 1 but he did not.

38. The Tribunal considered the evidence. We noted that this was the first month of the fiscal year. If the company had made contact before 23 May 2011 then, taking into account the detail provided in later months, we would have expected this contact to be recorded. However, this would only be apparent if the Action History record was complete – ie that we had been provided with the record from the beginning of the fiscal year.

39. If the Tribunal has not been provided with the complete record, but only that from 23 May 2011, we would nevertheless have expected that any prior TTP

agreement would have been referred to by way of background to the disconnected call and/or that it would have prevented the issue of a P101.

40. In weighing the evidence, we also take into account the fact that in Mr Lacey's grounds of appeal to the tribunal, he said that the company was "not aware of the significance of calling before the due date rather than around the due date."

41. On the basis of the evidence we find as a fact that no call was made by the company before the due date, and that there is nothing to indicate that the company's staff reasonably believed that there was a TTP agreement for Month 1

Months 6 and 7

42. Both these months were paid together, on 5 December 2012. Month 6 was over a month late and Month 7 was 13 days late. The Action History record provided to the Tribunal:

> (1) begins at 23 October, the day after the due date for electronic payment of PAYE and 4 days after the due date for payment by cheque;
>
> (2) records the issue of an estimated PAYE notice ("P101") for the month, on 27 October 2011;
>
> (3) records receipt of a call from Mr Addison of the company on 2 November 2011, as follows: "payt promise Mr Addison (Auth Person) mnth 6, PYT on 16/11/2011 for £25,000, by Cheque. Late due to cash flow. Educated about in year penalties. WLAP[3]";
>
> (4) records a further call from Mr Addison on 24 November as follows: "is finding out figs of month 5+6 and calling me back. Has no idea why not paid. Needs to speak to MD."

43. The Tribunal notes that there are no records for the period before the due date. However, the first call record makes no reference to any earlier conversation between the company's staff and HMRC, and thus on the evidence provided we find as a fact that the call on 2 November was the first which related to the Month 6 payment and there was no contact before the due date.

44. Since there was no TTP agreement by the due date for Month 6, the condition in FA 2009, Sch 56, para 10 is not satisfied.

45. We next considered whether the company nevertheless reasonably believed that it did have a TTP agreement because of the conversation on 2 November 2011, such as to provide it with a reasonable excuse.

46. However, even if the conversation on 2 November 2011 did amount to an agreement that the company would pay late (which Mrs Gardiner did not accept) the company did not keep its promise to pay £25,000 by 16 November 2011: payment was in fact not made until 5 December.

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[3] The Tribunal was informed that this abbreviation means "Warning of Legal Action and Penalties"

47. As a result, the company's staff cannot reasonably have believed that the company had a continuing agreement with HMRC that it could make the Month 6 payment late.

48. In relation to Month 7, no calls are recorded by HMRC, even though the Tribunal was provided with the complete Action History record for the one month period before the due date and for the week which followed. On the evidence provided, the Tribunal therefore finds as a fact that there was neither a formal "para 10" TTP agreement for Month 7, nor any other agreement such as potentially to provide a reasonable excuse defence.

Month 10

49. Month 10 was paid 9 days late, on 28 February 2012. The Action History records that HMRC called the company on 23 February 2012, and asked the director to call back. On the following day, HMRC called again and got through to Mr Lacey. He promised to pay £27,000 by cheque on 27 February 2012. The Action History records "WLAP".

50. Mr Lacey accepted that the Action History for this date was an accurate record of what was said, but complained that the penalties were not explained to him in any detail.

51. On the basis of the foregoing, the Tribunal finds that, in relation to Month 10, there was no TTP agreement and no reasonable expectation on the company's part that HMRC had entered into such an agreement.

Month 11

52. Month 11 was paid 11 days late, on 30 March 2011. The Action History records a call from Mr Lacey to HMRC on 23 March 2011, four days after the deadline for a cheque payment. It records that Mr Lacey made a "payment promise" that the company would pay by 28 March 2012 by cheque, and ends "WLAP (late payment)".

53. Given the date of this call, and the explicit reference to WLAP, the Tribunal finds that no TTP agreement was made before the due date, and that the company cannot have reasonably believed that they were excused the penalty if they kept to their promised payment date.

Conclusion on TTP agreements

54. The Tribunal therefore concludes, on the basis of the evidence, that there was no TTP agreement for any of the months for which a penalty was levied, and that the company could not reasonably have believed that this was the case.

Cashflow

55. Mr Lacey said that the company had suffered in 2010-11 from the withdrawal of the invoice discounting facility and that it had subsequently to restructure. In the

company's appeal to HMRC, he said that had the facility not been withdrawn "there would have been no issue with payments."

56. Mrs Gardiner relied on FA 2009, Sch 56, para 16(2)(a), which says that a taxpayer can only claim that an insufficiency of funds is reasonable excuse if "unless attributable to events outside of his control".

57. She said that the company had had ample time, from October 2010 to May 2011, to sort out a solution to the withdrawal of the facility. She drew the Tribunal's attention to the fact that, although the PAYE was paid late for October and November 2010, the company was back on track before the end of that fiscal year, so that the payments made for months 9 and 10 were on time and those for months 11 and 12 were only slightly late.

58. The Tribunal agreed with Mrs Gardiner.

Proportionality

59. Mr Lacey submitted that the penalties were disproportionate, taking into account in particular that on average the company was only around 7-10 days late each month.

60. He said that had the company obtained a TTP agreement for Month 1, and then allocated Month 1's payment to Month 2, there would have been no penalty. He referred to an article which he thought he had read in *Tax Adviser* magazine on the question of allocation. He said if the company "had been better at milking the system" the penalty would have been lower or would have disappeared altogether.

61. Mrs Gardiner said that HMRC had followed the legislation "to the letter" and relied on *Total Technology (Engineering) v R&C Commrs* [2012] UKUT 418(TC) ("*Total Technology*") and *Dina Foods v R&C Commrs* [2011] UKFTT 709(TC) ("*Dina Foods*"). In relation to allocation, she said that the company had paid by cheque on ten out of the twelve months, and would have used the monthly payslips. It had thereby allocated the payments to the relevant month. Mr Lacey agreed that the company had done this.

62. The Tribunal first considers the issue of allocation and then proportionality generally.

Allocation

63. Mr Lacey's case was not that the company had, in fact, made a different allocation of the payments, but that this possibility made the penalty even more disproportionate.

64. The Tribunal considered the question of allocation at some length in *Mansell v R&C Commrs* [2012] UKFTT 602(TC) at [46] to [70] and does not repeat that analysis here. But we accept that *Mansell* did not raise allocation in the context of proportionality.

65. We are, however, unaware of any authority which allows us to hold that a penalty should be regarded as disproportionate because the taxpayer could have availed himself of a legal method of avoiding the penalty (but did not do so), and no authority was cited to us. In our judgment, when the Tribunal is required to assess whether or not a statutory provision is, or is not, disproportionate, the existence or otherwise of avoidance techniques is an irrelevant factor.

66. We also express some scepticism about the use of allocation to avoid or reduce penalties which would otherwise be due under Sch 56. In so doing, we freely acknowledge that we do not know what action HMRC would have taken, had the company asked for a TTP agreement in Month 1, deferring the Month 1 debt for twelve months, and had then allocated the amount deducted from the Month 1 payroll to the month liability. But we suspect that the company is being unduly optimistic in thinking that HMRC would make such an agreement, given that the company was plainly able to meet all its other PAYE liabilities on a monthly basis. If (as seems to us likely) HMRC refused a TTP agreement for Month 1, but the company nevertheless allocated the tax and NICs deducted from its Month 1 payroll to its Month 2 liability, the Month 1 liability would remain due. The Action History record in this case demonstrates HMRC's willingness to take enforcement action to collect PAYE debts, and thus a failure to pay Month 1 debt, without the benefit of a TTP agreement, might well involve the company in distraint or other enforcement proceedings. Our comments on this point are, however, speculative as no such allocation has been attempted by the company, and they are thus *obiter* our decision in this case.

Proportionality: Total Technology

67. Mrs Gardiner cited *Total Technology* as a recent authority on proportionality. In *Total Technology* the Upper Tribunal considered whether a VAT default surcharge was disproportionate. Because the dispute concerned VAT, the decision considered proportionality under (a) EU law and (b) Article 1 Protocol 1 ("A1P1") of the Human Rights Convention, incorporated as Schedule 1 of the Human Rights Act 1988.

68. This dispute concerns a penalty for late submission of PAYE returns. There is no EU law dimension. The Tribunal can thus only consider whether the penalty breaches the Convention, and in particular A1P1.

69. In *Total Technology* the Upper Tribunal comprehensively reviewed the relevant case law on proportionality under human rights law at [50] to [66] and this Tribunal does not repeat those paragraphs here.

70. At [103] of its decision, the Upper Tribunal decided that the VAT default surcharge regime did not fall outside the margin of appreciation afforded to governments under the Convention; that the default surcharge regime was "not devoid of rational foundation" and that, while the penalty charged in that case might be "harsh" it did not meet the threshold of being "plainly unfair".

71. The reference to "devoid of rational foundation" reference derives from[4] *R (Federation of Tour Operators) v HM Treasury* [2008] STC 2524 at [32], when Waller J confirmed the earlier decision of Stanley Burnton J, who had held that the legislation at issue in that case would be disproportionate if it was "devoid of reasonable foundation".

72. The reference to "not merely harsh but plainly unfair" is derived from[5] *International Transport Roth GmbH v Home Secretary* [2003] QB 728 where at [26] Simon Brown LJ said:

> "… it seems to me that ultimately one single question arises for determination by the court: is the scheme not merely harsh but plainly unfair so that, however effectively that unfairness may assist in achieving the social goal, it simply cannot be permitted? In addressing this question I for my part would recognise a wide discretion in the Secretary of State in his task of devising a suitable scheme, and a high degree of deference due by the court to Parliament when it comes to determining its legality. Our law is now replete with dicta at the very highest level commending the courts to show such deference."

Proportionality: Dina Foods

73. *Dina Foods* concerned an appeal against a penalty of £10,247.61 under the provisions at issue in this appeal. Mrs Gardiner particularly relied upon Judge Berner's summary at [51]-[52], which reads as follows:

> 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

[4] For the discussion of this case by the UT, see [50-51]

[5] at [52]-[56], [65] and [68] of the UT's judgment

> 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."

Conclusion on proportionality

74. Th Tribunal respectfully agrees with this analysis of the Sch 56 penalty regime set out by Judge Berner in *Dina Foods*, and finds that his analysis is wholly consistent with the analysis of proportionality more recently expressed by the Upper Tribunal in *Total Technology*.

75. For the same reasons as those set out by Judge Berner, we find that the penalty levied on the company is not disproportionate.

Fairness

76. Mr Lacey argued that HMRC had been unfair in that:

(1) it had not told the company about the size of the penalty;

(2) although penalties were mentioned during the calls between the company's staff and HMRC, the company had not been "properly informed" of their quantum;

(3) the penalty warning letter which HMRC say they sent out on 27 May 2011 was not in fact received by the company;

(4) no letter setting out the accruing penalties was sent to the company during the year;

(5) at no time did HMRC write to Mr Lacey at his home address advising him of the penalties which were being accrued by the company.

77. Taking the last point first, Mrs Gardiner said that HMRC would not take the initiative to write to an individual company director at home about a corporate obligation because the company had given HMRC the address to which it wanted communications to be sent, and HMRC would therefore send letters to that address.

78. Mrs Gardiner also said that the Upper Tribunal in *Hok v R&C Commrs* [2012] UKUT 363(TC) had made it clear, in the context of a penalty incurred for late submission of a PAYE end of year return ("P35") that the First-tier Tribunal had no jurisdiction to consider whether HMRC had exercised their common law duty of fairness. She said that the position was the same when considering FA 2009, Sch 56 penalties.

79. We agree with Mrs Gardiner. In *Hok*, the Upper Tribunal held at [54] that:

> "…the question is not the amount of a penalty, or even whether one is due as a matter of law…but whether HMRC should be precluded from imposing the penalties prescribed by that section, or from collecting them if imposed. That, in our judgment, is a quite separate question of administration, one which, in accordance with the authorities to which we have already referred, is capable of determination only by way of judicial review and therefore not by the First-tier Tribunal."

80. Although *Hok* considered P35 penalties, in our view the words set out above aptly describe the position with regard to penalties levied under FA 2009, Sch 56. Whether HMRC had acted fairly by not spelling out the accruing quantum of the penalties when Mr Lacey and his members of staff called to discuss their late payments, is therefore not a matter this Tribunal has jurisdiction to consider.

81. We note, however, the following points:

(1) HMRC had sent the company information about the penalties by way of the Employer Bulletin; there was further and more specific information on the HMRC website, and the company was repeatedly warned by HMRC during the various phone calls that it was risking legal action and penalties.

(2) 2011-12 was the second year in which this penalty regime had been in place, so it was not brand new legislation. In any event, the onus is on the company, as it is on all taxpayers, to be aware of changes to the law, and to establish whether, and to what extent, those changes affect its operations. The company could have taken action itself to establish how the penalty regime worked and what the quantum was likely to be.

Decision

82. As a result of the foregoing, we find that the company's appeal fails and we confirm the penalty of £6,946.30.

Gaps in the evidence

83. Earlier in this decision we set out the Action History evidence submitted by HMRC and the gaps in that evidence.

84. When a key issue in dispute is what was said by the parties, incomplete call records are unhelpful to the tribunal, given that one of our primary tasks is to find the facts.

85. In this case, Mr Lacey's evidence that no calls would have been made in months where payments were less than seven days late, meant that the gaps in HMRC's records did not prevent us from finding the facts, but in another case such selectivity may lead to a tribunal accepting an oral assertion that a call took place (when there is perfectly sound contemporaneous HMRC evidence that there was no contact at all). Of course, a tribunal also has the power to adjourn the proceedings and direct HMRC to submit the missing evidence under Rule 5(3)(d) of the Tribunal Procedure (First-

tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules"), but this causes delay and further costs.

Appeal rights

86. 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 Rules.

87. 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.

ANNE REDSTON
TRIBUNAL PRESIDING MEMBER

RELEASE DATE: 19 February 2013