TC02159

Appeal number: TC/2010/01197

INCOME TAX–penalties – late payment of PAYE – paragraph 6 Schedule 56 Finance Act 2009 – whether payments made in time – whether HMRC behaved unfairly - whether reasonable excuse

FIRST-TIER TRIBUNAL
TAX CHAMBER

ROGERS CONCRETE LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE GUY BRANNAN
JULIAN STAFFORD

Sitting in public at Oxford on 13 July 2012

Dominic Rogers, director, for the Appellant

Karen Evans, presenting officer, for the Respondents

DECISION

1. This is an appeal against a penalty of £4,974.99 charged under paragraph 6 of Schedule 56 Finance Act 2009 relating to the alleged late payment of PAYE (which for these purposes included PAYE and NIC) by the appellant in respect of nine monthly periods in the income tax year ended 5 April 2011.

The facts

2. The appellant is in the business of supplying stone paving and is based in Oxfordshire.

3. There are nine monthly PAYE periods under appeal. The details are set out in the Table below using figures produced by HMRC. The column "EDP" (which we were informed stood for "Effective Date of Payment") reflects the date on which HMRC allege the payments of PAYE were received. The date of payment, however, is one of the issues in dispute and the dates are, therefore, at this stage used for illustrative purposes. The final column of the Table below was based on information supplied by Mr Rogers, a director of the appellant, and represents the date on which the relevant cheques cleared the appellant's bank account. The periods in dispute are Months 2 – 10 inclusive.

Tax period number	**Tax period ended**	**Amount tax** **£**	**Posted**	**EDP**	**Penalty @3%** **£**	**Date Payment Cleared**
Month 1	5 May 2010	16,745.77	21/05/10	21/05/10	–	25/05/10
Month 2	5 June 2010	22,143.12	22/06/10	22/06/10	664.29	24/06/10
Month 3	5 July 2010	19,815.98	21/07/10	21/07/10	594.48	23/07/10
Month 4	5 August 2010	23,238.64	25/08/10	25/08/10	697.17	27/08/10
Month 5	5 September 2010	17,936.13	23/09/10	23/09/10	538.08	27/09/10
Month 6	5 October 2010	16,145.68	26/10/10	26/10/10	484.37	28/10/10
Month 7	5 November 2010	19,019.17	22/11/10	20/11/10	570.58	24/11/10
Month 8	5 December 2010	16,129.05	21/12/10	21/12/10	483.88	23/12/10
Month 9	5 January 2011	14,526.74	24/01/11	22/01/11	435.78	25/01/11
Month 10	5 February 2011	16,878.51	04/03/11 and 14/03/11	01/03/11 and 12/03/11	506.36	16/03/11

Month 11	5 March 2011	–	28/03/11	26/03/11	–	30/03/11

4. It was common ground that the due date for payment of the tax was the 19th day of each month. According to HMRC's records, therefore, the appellant was late in paying its tax in each month under appeal. No penalty was payable in respect of Month 1 (paragraph 6 (3) Schedule 56 Finance Act 2009). In respect of Month 11, it was recently (28 June 2012) accepted by HMRC that the tax payment was made in accordance with a "Time To Pay" arrangement (albeit an informal one) with HMRC and that therefore no penalty should be charged. Notwithstanding this, we note that HMRC's review of its penalty decision appeared to proceed in ignorance of this arrangement. In accordance with the decision of this Tribunal in *Agar Limited v HMRC Commissioners* [2011] UKFTT 773 (TC), no penalty has been charged in respect of Month 12 as regards the tax year ended 5 April 2011.

5. The appellant did not dispute that the tax was paid late in respect of Month 6 and stated that this was a simple oversight.

6. Ms Evans explained that the EDP represented the date on which the payment was received by HMRC. In the case of a cheque received through the post, the payslip accompanying the cheque will be placed in a machine which reads information and processes the payment. Ms Evans explained, having made enquiry of her accounting colleagues, that 99% of cheques received were processed on the day of receipt. Those that were not processed until later still had the EDP of the original date of receipt rather than the date on which the cheque was processed.

7. We note that Ms Evans's explanation of the meaning of EDP is consistent with HMRC's published guidance in "DMBM201020 - Payment processing: effective date of payment (EDP) rules". This states:

> *"Cheques (including postal orders) and cash*
>
> *Handed into HMRC, or received in the post.*
>
> | **Head of Duty** | **EDP/DoR** |
> |---|---|
> | All Heads of Duty (except Corporation Tax and VAT) | 8. The day of receipt of the payment by HMRC. But, if the payment was received by post following a day when the office was closed, the EDP is the day that the office was first closed. For example, a payment received in the post on a Tuesday where Monday was a bank holiday is given Saturday's date as the EDP. " |

9. Payments were "Posted" when they were allocated to the taxpayer's account in respect of a particular liability. For this reason, the date on which some payments were marked as "Posted" is sometimes a day or two after the EDP.

10. The date on the payslips and cheques were as follows:

Month	Cheque Date	Payslip Date
1	17/5/10	17/5/10
2	15/6/10	15/6/10
3	15/7/10	15/7/10
4	12/8/10	12/8/10
5	Unclear	17/9/10
6	18/10/10	18/10/10
7	Undated	17/11/10
8	15/2/10	14/12/10
9	17/1/11	17/1/11
10	13/4/11	13/4/11

11. Mr Rogers stated that a cheque would typically be sent to HMRC by the 17th or 18th of each month. Mr Rogers (who was a qualified chartered accountant) calculated the amount of tax due. He would then prepare and sign a payslip and a cheque and that these would then be passed to Mr Hurley for, in the case of the cheque (but not the payslip, where co-signature was not necessary) co-signature by the managing director, Mr Hurley.

12. Mr Hurley, said that he would sign the cheque provided by Mr Rogers on the same day and put it in the postbag on the same day. He noted that Royal Mail collected the post at around 3 – 4 pm each day. He stated that he sent the cheques by first class post. Listening to Mr Hurley's evidence, although we had no doubt that he genuinely believed he had posted the cheques in time, we had some reservations about the accuracy of Mr Hurley's recollection.

13. In addition, we note that in relation to Month 6, which the appellant admitted had been paid late, Mr Hurley told HMRC by telephone that the cheque had been sent on 25 October 2010 (and HMRC record the EDP as 26 October 2010) but the cheque and payslip were both dated 18 October 2010. We took this as an indication that the dates on the cheques and payslips were not accurate evidence of the date on which they were posted.

14. In correspondence (letter dated 8 September 2011) between the parties, Mr Rogers noted that in each of the periods under appeal the cheques were cleared before

the 28th of the month "which would suggest these cheques could have been received by your office by the 19th of the month, and were paid on time."

15. As noted above, the appellant accepted that the tax payment in respect of Month 6 was paid late because of an oversight. HMRC's telephone records indicate that they telephoned Mr Hurley on 26 October 2010 regarding the overdue payment for Month 6. The records indicate that HMRC warned Mr Hurley about legal action and penalties. Mr Hurley stated that the warning related only to Month 6 and he was not informed that HMRC considered that payments in respect of months 2, 3, 4 and 5 had been received late. Mr Rogers stated that the first the appellant knew about HMRC's contention that payments in respect of the months under appeal had been paid late was when HMRC wrote a penalty notification letter on 10 August 2011.

16. There were further telephone calls between Mr Hurley and HMRC in relation to Month 10 on 3 March 2011. HMRC initiated the calls because payment for month 10 was late. Mr Hurley is recorded as stating that the tax due would be settled in two payments, with £2,000 being paid immediately and the balance was paid by cheque on 14 March 2011 (the cheque clearing the appellant's bank account on 16 March 2011). HMRC's computerised record of the telephone call states that Mr Hurley indicated that he wanted to defer the payment of the tax due in respect of Month 11 until 28 March 2011, but HMRC advised that they wanted the liability in respect of Month 10 paid before they would agree to defer Month 11. The record contains the acronym "WLAP", which is a standard abbreviation used by HMRC and stands for "warned about legal action and penalties." Mr Hurley insisted that the only penalty mentioned was that in relation to Month 10.

17. In her submissions, Ms Evans referred to the fact that in the tax year ended 5 April 2012 the appellant had failed to pay on time, for Months 1, 2, 3, 4, 5, 8, 9 and that Months 10 and 11 were still outstanding. The purpose of this submission was to indicate that the appellant had continued its pattern of late payment. Mr Rogers disputed this. He stated that the appellant had agreed a deferred payment arrangement with HMRC's "Field Force" team. Mr Rogers also noted that the claim that Months 10 and 11 were outstanding was wrong and produced evidence that the payments had been made. We accepted Mr Rogers's evidence and took no account of the appellant's pattern of PAYE payments in the year ended 5 April 2012 or that HMRC alleged that Months 10 and 11 in respect of the year ended 5 April 2011 were still outstanding.

18. At the hearing, there was a dispute between the parties concerning the amount of warning (if any) that HMRC had given the appellant that its PAYE payments were being made late (as HMRC allege). HMRC’s records show that a penalty default letter was sent to the Appellant on 28 May 2010 i.e. shortly after the beginning of the tax year ended 5 April 2011.Ms Evans informed us that the letter had not been returned undelivered. Although a copy of the letter was not retained on HMRC's files, an example of the standard form letter was produced. The letter read as follows:

> "We have sent you this warning letter because it appears that you have not paid your PAYE on time. You may be liable to a penalty if you pay late more than once in a tax year, or if you pay late by six months or

> more. PAYE includes Income Tax, National Insurance contributions, Construction Industry Scheme deductions and Student Loan deductions."

19. The letter referred to further information on penalties being available on HMRC's website and noted that HMRC would take action against employers who did not pay their PAYE on time and who did not have a time to pay agreement.

20. Mr Rogers said the appellant had no record of this letter having been received and he had no recollection of the letter. We find, however, that it is more likely than not that the letter was received but was overlooked (as Mr Rogers, at one point, admitted was a possibility).

21. On 10 August 2011, HMRC wrote to the appellant informing it that HMRC was charging penalties of £8,113.91 in respect of late payments of PAYE for the tax year ended 5 April 2011. Mr Rogers stated that this was the first time that he became aware that HMRC considered that (with the exception of Month 6 and Month 10) payments of PAYE had been made late. For the reasons given above, the penalties were later reduced to £4,974.99.

22. The appellant requested an internal review of HMRC's position on 18 October 2011. The result of the review was notified to the appellant by a letter dated 5 December 2011. The review concluded that the original penalty decision (at that date the penalties stood at £7,948.36) should be upheld. The review letter came in for extended criticism from the appellant at the hearing for the following reasons.

23. The letter stated that a balance of £4,138.73 was still outstanding in respect of the tax year ended 5 April 2011. The appellant produced receipts to show that this had been paid by credit card on 28 September 2011, a date agreed with HMRC. We accept the appellant’s evidence.

24. The letter stated that the appellant had received a penalty warning letter on 28 May 2010 but, as noted above, the appellant denied receiving this letter. The letter also referred to the conversations with Mr Hurley warning about penalties, but the appellant stated that the warnings had related only to Months 6 and 10.

25. Also, as regards Month 10 the letter stated that £2,000 had been received but the balance had not been paid as arranged in a telephone conversation with Mr Hurley. The appellant pointed out that the balancing payment had been received by HMRC on 14 March 2011 and a cheque cleared the appellant's account on 16 March. Again, we accept the appellant’s evidence.

26. The appellant also pointed out that additional comments on the letter relating to Month 11 were incorrect. In any event, HMRC have now accepted that Month 11 was covered by a time to pay arrangement.

27. It seems to us that the review letter of 5 December 2011 was flawed and took account of a number of factors which were incorrect. It is hard to avoid the impression that the letter was written without full knowledge of the information which HMRC

possessed and that the left hand of HMRC did not know what the right hand was doing. In particular, there seems to be inadequate liaison between HMRC's central records and HMRC's "Field Force".

28. In the course of the hearing, Mr Rogers stated that the profitability of the appellant's business had been declining. Through a redundancy process the staff employed by the appellant had decreased from around 50 to 20 people. The appellant was asset rich but income had been declining. Turnover had decreased from approximately £2.8 million to £1.8 million and had "flat lined" for the last three years. The winters of 2009 and 2010 had been particularly severe and had badly affected sales with the sales in January 2011 being badly hit.

29. In addition, the appellant's overdraft banking arrangements had become more restrictive. Prior to 2009 it had been possible to arrange additional overdrafts during the seasonally slower winter months because the appellant had assets in excess of £1.6 million. After 2009 the appellant's overdraft limit was agreed with the bank in the autumn and the bank refused to increase the amount to take account of seasonal fluctuations.

Arguments of the parties

HMRC

30. Ms Evans pointed to HMRC's computer records, particularly the EDP records, to demonstrate that the appellant's payments for the disputed periods had been late.

31. The appellant, Ms Evans submitted, had been warned that its payments of PAYE were late and that it was at risk of incurring penalties. Miss Evans referred to the warning letter of 28 May 2010 and to the conversations that HMRC had with Mr Hurley referred to above.

32. Ms Evans argued that the appellant had not put forward any facts which constituted a reasonable excuse and that HMRC had considered that no special circumstances existed for the purposes of paragraph 9 Schedule 56 Finance Act 2009.

33. Ms Evans, in response to the appellant's argument that HMRC had acted unfairly in not warning it that it was accruing penalties, cited decisions of this tribunal in *Rodney Warren & Co v HMRC Commissioners* [2012] UKFTT 57 (TC) [47] and *Dina Foods Limited v HMRC Commissioners* [2011] UKFTT 709 (TC) [37]. Ms Evans argued that there was no obligation on HMRC to give warnings and that HMRC had publicised the introduction of the new penalty rules so that employers should have been aware of some of the published information.

The appellant

34. Mr Rogers argued that the PAYE payments in respect of Months 2 – 10 had been paid on time. The cheques had been posted with a first-class stamp, usually

around the 17th day of the month. The date on which the funds cleared the appellant's bank account also suggested that the cheques could have been received on time.

35. Mr Rogers also argued that it was unfair for HMRC not to have warned the appellant that its payments had not been received on time. The letter of 28 May 2010 had not been received or, at least, Mr Rogers had no recollection of the letter. The conversations with Mr Hurley had only touched on penalties in respect of those months (Months 6 and 10). HMRC had acted unfairly in carrying out its duties. Mr Rogers cited the tribunal decision in *HMD Response International v HMRC Commissioners* [2011] UKFTT 472 (TC) [16 and 31].

36. HMRC's review letter of 5 December 2011 had been defective and indicated that HMRC's procedures information gathering were deficient.

The legislation

37. The new penalty code for late payments of tax was introduced by Schedule 56 to the Finance Act 2009. The relevant paragraph of the Schedule, applying to late payments of PAYE, was paragraph 6, which came into force on 6 April 2010 (SI 2010/466 art 3). Although newly enacted, paragraph 6 was amended with effect from 25 January 2010 (SI2011/132 art 2(b)) by paragraphs 1 and 6 of Schedule 11 Finance (No2) Act 2010. For the purpose of this appeal, which spans the tax year 2010-2011 both versions of paragraph 6 are relevant and are set out below. We do not, however, believe that the difference in wording of the two versions of paragraph 6 has any material impact on the outcome of this appeal, but set them out for ease of reference.

38. Paragraph 6, as originally enacted and in force for the period 6 April 2010 to 24 January 2011, read as follows:

> "6(1) P [the taxpayer] is liable to a penalty under this paragraph of an amount determined by reference to the number of defaults in relation to the same tax that P has made during the tax year.
>
> (2) P makes a default in relation to a tax when P fails to pay an amount of that tax in full on or before the date on which it becomes due and payable.
>
> (3) But the first failure during a tax year to pay an amount of tax does not count as a default in relation to that tax during that tax year.
>
> (4) If P makes 1, 2 or 3 defaults during the tax year, P is liable to penalty of 1% of the total amount of those defaults.
>
> (5)If P makes 4, 5 or 6 defaults during the tax year, P is liable to penalty of 2% of the total amount of those defaults.
>
> (6)If P makes 7, 8 or 9 defaults during the tax year, P is liable to penalty of 3% of the total amount of those defaults.
>
> (7)If P makes 10 or more defaults during the tax year, P is liable to penalty of 4% of the total amount of those defaults.
>
> (8)In this paragraph–

(a) in accordance with sub-paragraph (1), the references in sub-paragraphs (4) to (7) to a default are references to a default in relation to the tax mentioned in sub-paragraph (3),

(b) the amount of a default is the amount which P fails to pay, and

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

39. The amended paragraph 6, in force from 25 January 2011 to the end of that tax year, read as follows:

"(1) P[the taxpayer] 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);

(c) a payment due under the Income Tax (Construction Industry Scheme) Regulations 2005 (SI 2005/2045);

(d) a repayment in respect of a student loan due under the Education (Student Loans) (Repayments) Regulations 2009 (SI 2009/470) or the Education (Student Loans) (Repayments) Regulations (Northern Ireland) 2000 (SR 2000 No 121).

(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."

40. It will be seen from both versions of paragraph 6(6) that ten defaults in the tax year renders a taxpayer such as the appellant liable to a penalty of 3% of the total amount of tax comprised in those defaults.

41. Schedule 56 also contains provisions (paragraph 9) relating to a reduction in a penalty for "special circumstances" and (paragraph 16) removing liability for a penalty where there was a "reasonable excuse" for the failure. Paragraph 9 provides:

"(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."

42. Paragraph 16 contains the provisions relating to "reasonable excuse". As was the case with paragraph 6, paragraph 16 was amended as regards PAYE payments with effect from 25 January 2011 (SI 2011/132 art 3). The original version of paragraph 16, in force from 6 April 2010 to 24 January 2011 read as follows:

"(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."

43. From 25 January 2011, paragraph 16 read 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 paragraphs 6, 8B, 8C, 8G and 8H.]
>
> (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."

44. In our view, the different versions of paragraph 16 do not materially affect the outcome of this appeal.

45. Paragraph 13 of Schedule 56 introduces the provisions relating to appeals against penalties imposed under that Schedule. Paragraph 13 provides:

> "(1) P may appeal against a decision of HMRC that a penalty is payable by P.
>
> (2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P."

46. An appeal in respect of the "reasonable excuse" provisions of paragraph 16 would fall under paragraph 13 (1) because if a reasonable excuse is found to exist no liability to a penalty arises. On the other hand, an appeal relating to "special circumstances" under paragraph 9 would fall under paragraph 13 (2) because it would relate to the amount of the penalty payable.

47. Paragraph 15 of Schedule 56 sets out this tribunal's jurisdiction in relation to such appeals. Paragraph 15 provides:

> "(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))."

48. Thus, in relation to an appeal involving "reasonable excuse" paragraph 15 (1) allows the tribunal either to affirm or cancel HMRC's decision. In relation to an appeal involving the issue of "special circumstances", the tribunal may rely on paragraph 9 to a different extent from HMRC only if the tribunal considers HMRC's decision to be flawed in the judicial review sense of that expression.

49. Finally, section 7 Interpretation Act 1978 provides:

"Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

Discussion

50. This case largely turns on the question of the date on which the payments of PAYE by the appellant in respect of Months 2 – 10 were received by HMRC, but it also raises questions of whether HMRC acted unfairly and whether a reasonable excuse existed in respect of some of late payments PAYE.

Date of payments

51. Having carefully considered the evidence, we have concluded that the appellant made its payments of PAYE in respect of Months 2 – 10 after the due date of the 19th day of the month.

52. We reach this conclusion for the following reasons.

53. First, the EDP records of HMRC indicated that all these payments were received late. In addition, the evidence of the appellant in respect of the dates on which the funds cleared the appellant's bank account (allowing for non-business days) was consistent with the EDP records, assuming the usual clearing period of three

days. It also seemed unlikely to us that cheques posted by first class mail on the 17th or 18th of the month would repeatedly be recorded by HMRC as being received late. Occasional delays in the post do, of course, occur but it is unlikely that that should have occurred in respect of all the periods in dispute. A more likely explanation is that the cheques were posted too late to be received by the 19th of the month.

54. Secondly, although Mr Hurley stated that the returns would be posted by the 17th or 18th day of the month we were not satisfied that Mr Hurley's recollection – which seemed to us genuine but somewhat vague – was wholly accurate. Moreover, as the date of the cheque and payslip in respect of Month 6 demonstrate, the date on those documents is not necessarily an accurate record of the date on which they were posted.

55. For this reason, we consider that the deeming provision of section 7 Interpretation Act 1978 is inapplicable because we consider that the contrary has been proved.

Did HMRC act unfairly?

56. As regards the appellant's argument that HMRC had acted unfairly in failing to warn it that, in HMRC's view, the appellant had failed to make PAYE payments on time, there is no doubt that HMRC is under a common law duty to act fairly, like any other public body: see *British Sky Broadcasting Group Plc v Customs & Excise* [2001] EWHC Admin 127.

57. In that case Elias J [8 – 10] drew attention to the high hurdle faced by a taxpayer seeking to argue that HMRC's actions (or in this case inactions) amounted to an abuse of power:

> "8. However, it is only in an exceptional case that unfairness will amount to abuse of power. In *Preston v Inland Revenue Commissioners* [1985] STC 282 at page 293, another case involving alleged unfairness by the taxing authorities, Lord Templeman commented (page 239):
>
> "The court can only intervene by judicial review.....if the court is satisfied that the `unfairness' of which the taxpayer complains renders the insistence by the Commissioners on performing their duties or exercising their powers an abuse of power by the Commissioners".
>
> He also observed that:
>
> "The court cannot in the absence of exceptional circumstances decide to be unfair that which the Commissioners by taking action against the taxpayer had determined to be fair"
>
> Similar observations were made by Lord Scarman (at page 299).
>
> 9. The need to find exceptional circumstances to warrant intervention was emphasised by the Court of Appeal in *R v Inland Revenue Commissioners ex parte Unilever Plc* [1996] STC 681. Simon Brown L.J. in that case used the term "conspicuous unfairness" to describe the

quality of the unfairness necessary to constitute an abuse of power. He said this at page 695:

"Unfairness amounting to an abuse of power as envisaged in *Preston* and the other revenue cases is unlawful.....because either it is illogical or immoral or both for a public authority to act with conspicuous unfairness and in that sense abuse its power".

Later in his decision at page 697 he observed that there a distinction between

"on the one hand mere unfairness - conduct which may be characterised as "a bit rich" but nevertheless understandable - and on the other hand a decision so outrageously unfair that it should not be allowed to stand"

10. Ultimately, as the Court of Appeal observed in *R v North East Devon Health Authority ex parte Coughlan* [2000] 2WLR 622, it is for the court to determine whether there is an abuse of power. But the passages to which I have made reference are a strong reminder that the threshold of unfairness amounting to an abuse of power is a high one, and that the court must be careful not to interfere simply because a decision can be justifiably subject to some criticism."

58. Discriminatory treatment of taxpayers (eg where taxpayers who are in materially the same position but are treated differently), misrepresentation or breach of contract by HMRC are all examples given in *British Sky Broadcasting* and *Preston* of instances which would amount to abuse of power.

59. Although there is currently some uncertainty regarding the jurisdiction of this tribunal in respect of judicial review (see the judgment of Sales J in *Oxfam v Revenue and Customs* [2009] EWHC 3078 (Ch)) there is little doubt in our mind that the provisions of paragraph 15 Schedule 56 Finance Act 2009 allow us to review the lawfulness of HMRC's decision as well as its substantive merits.

60. Paragraph 15 (1) allows us to cancel or affirm HMRC's decision in respect of an appeal under paragraph 13 (1) i.e. where the issue is whether a penalty is payable by a taxpayer. The issue whether HMRC has acted fairly in making a penalty determination goes to the question of whether a penalty is payable. It would also involve, of course, considering whether the basic requirements (e.g. whether payments had been made late and, if so, on how many occasions) for a penalty liability had been met. This would also have the effect of construing paragraph 15 (1) in a manner which would give effect to a taxpayer's Convention rights. In the context of a penal provision invoking the criminal head of Article 6.1 of the European Convention of Human Rights (*Jussila v Finland* (2006) (A/73053/01) a taxpayer should have access to a tribunal of full jurisdiction (*Silvester's Horeca Service v Belgium* 47650/99 [2004] ECHR 97 and *Segame SA v France* 4837/06).

61. Alternatively, if HMRC act unfairly in a way which amounts to an abuse of power, this could allow a taxpayer to invoke the reasonable excuse defence in appropriate circumstances. For example, in *HMD Response International v HMRC Commissioners* [2011] SFTD 1017 the tribunal held that the fact that HMRC delayed

for four months before sending out a penalty notice (during which time additional penalties were incurred) in circumstances where the taxpayer honestly believed that it had discharged its obligation to file Form P 35 amounted to unfair conduct allowing the taxpayer to rely on the reasonable excuse defence.

62. Thus it seems that either because, under paragraph 15, we can review HMRC's decision to impose a penalty or because of its relevance to the reasonable excuse defence under paragraph 16, we must consider whether HMRC's conduct in this case represents unfairness amounting to an abuse of power. We should add, in this context, that we consider that the same test of unfairness (i.e. that it should amount to an abuse of power) that is relevant to judicial review should usually apply in the context of reasonable excuse – although we can envisage some circumstances where the same test might not be appropriate in cases of reasonable excuse.

63. Does the failure by HMRC to warn a taxpayer that the taxpayer has (at least in the view of HMRC) defaulted on its tax payment obligations result in unfairness in the sense of abuse of power such that a taxpayer can rely on the reasonable excuse defence or require us to consider whether we can review the decision of HMRC exercising our powers under paragraph 15 of Schedule 56 Finance Act 2009?

64. We note that there is no statutory requirement that HMRC should issue penalty warnings before making a penalty decision. We think it would only be in exceptional circumstances that a failure by HMRC to give warnings in respect of penalties under Schedule 56 would amount to a reasonable excuse. We agree with the views of this tribunal (Judge Berner and Mr Whiting) in *Dina Foods Limited v HMRC Commissioners* [2011] UKFTT 709 (TC) [38 and 39]:

> "38.In this context we have a number of observations to make concerning the scheme of Schedule 56 as a whole, as it applies to PAYE and NICs payments. The penalty regime is based on the number of defaults over a complete tax year. There is no separate penalty for each individual default; 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. A taxpayer who continues to pay late, so increasing both the amount of tax (and NICs) on which the penalty may be levied and the rate of the penalty, may well complain that his behaviour (and thus the amount of his liability) would have been different had a penalty been levied in respect of a default early in the tax year or at least a warning issued. But on the scheme of penalties that has been laid down, the total would not then have been capable of being ascertained, so the penalty could not at that earlier time have been assessed.
>
> 39. We do not therefore consider that 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 of itself capable of amounting either to a reasonable excuse or special circumstances."

65. We are satisfied that HMRC's conduct in this case, however, does not amount to a breach of HMRC's duty to act fairly. We have already found that HMRC did in fact send a warning letter to the appellant on 28 May 2010 advising that more than one

late payment in a tax year could result in penalties. HMRC also raised the question of penalties with Mr Hurley over the telephone in conversations relating to Month 6 and Months 10. We accept Mr Hurley's evidence that the warnings in those conversations related only to those months. Nonetheless, we consider that those warnings taken together with the letter of 28 May 2010 discharged HMRC's duty to act fairly. We think that the circumstances in the present case are very different from those in *HMD Response International*.

Was there a reasonable excuse?

66. At the hearing, the evidence of Mr Rogers made it plain that the extreme winter conditions of December 2009 and January 2010 badly affected the appellant's business leading to a slump in turnover and cash flow difficulties. Indeed this is obvious from HMRC's telephone records in respect of Month 10. In our view, the unexpectedly bad weather conditions, taken together with the restriction in the appellant's overdraft facilities, constitute a reasonable excuse within the meaning of paragraph 16 Schedule 56 Finance Act 2009 in respect of Month 10. Therefore, we have decided that no penalty should be payable in respect of Month 10.

Conclusion

67. For these reasons we affirm the penalties in respect of Months 2,3,4,5,6,7,8 and 9 and cancel the penalty in respect of Month 10.

68. 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.

GUY BRANNAN
TRIBUNAL JUDGE

RELEASE DATE: 1 August 2012