



TC03132

Appeal number: TC/2012/02703

INCOME TAX – PAYE – penalties under Schedule 56, Finance Act 2009 - whether no liability for such penalties because – (1) the relevant late payments of PAYE were made during the currency of an agreement for deferred payment (para. 10, Sch 56, FA 2009) – found on the facts that 4 out of 6 of them were – or (2) because there should be a reduction to take account of special circumstances (para. 9 Sch 56 FA 2009) – held that the Tribunal would make no such reduction in relation to the remaining 2 penalties – or (3) because there was a reasonable excuse for the failure to make the relevant payments of PAYE on time (para 16 Sch 56 FA 2009) – found on the facts in relation to the remaining 2 penalties that no such reasonable excuse had been established – appeal allowed in part

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

R J HERBERT ENGINEERING LIMITED

Appellant

and

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

Respondents

**TRIBUNAL: JUDGE JOHN WALTERS QC
LESLIE HOWARD**

Sitting in public at Cambridge on 30 July 2013

Mary A. Plant, Wheelers, Chartered Accountants, for the Appellant

Allan Hall, Presenting Officer, HM Revenue & Customs, for the Respondents

DECISION

Introductory

5 1. On 30 July 2013 the Tribunal held the adjourned hearing of this appeal, the appeal having been adjourned by Directions issued on 12 July 2012.

2. The appellant, R J Herbert Engineering Limited (“Herbert”), appeals against penalties charged for late payment of tax and associated national insurance contributions under PAYE Regulations (generally referred to herein as “PAYE”) imposed under Schedule 56, Finance Act 2009 (“Sch 56, FA 2009”) in the tax year 10 2010-11. The details of the penalties are as follows:

	<i>Month ended</i>	<i>Amount of PAYE</i>	<i>Days late in payment</i>	<i>Penalty at 2%</i>
	5 June 2010	£136,244.69	42	£2,724.89
	5 July 2010	£89,919.87	47	£1,798.40
15	5 Aug. 2010	£121,362.09	30	£2,427.24
	5 Sep. 2010	£110,658.04	13	£2,213.16
	5 Dec. 2010	£115,372.02	5	£2,307.44
	5 Jan. 2011	£110,870.45	13	£2,217.41
20	Total			£13,688.54

3. Originally, the penalties charged included a penalty in respect of late payment of PAYE due in respect of the months ended 5 November 2010 and 5 April 2011.

4. The late payment in respect of the month ended 5 April 2011 was excluded from 25 the calculation following the decision of the First-tier Tribunal in *Agar Limited v HMRC* (TC 01625) (see: paragraphs 56 to 60).

5. The late payment in respect of the month ended 5 November 2010 (which was a payment of £136,727.50 made 5 days late) was excluded from the calculation at a late stage (see: the letter from D. Thurlow, Collector, HMRC Debt Management, Essex to 30 Wheelers, acting for Herbert, dated 15 August 2012) on the basis that Mr Thurlow accepted that Herbert had a reasonable excuse for that late payment. The reasonable excuse appears from that letter to have been that HMRC accept that the first verbal warning about late payment penalties was not given to Herbert until a telephone call to Mark Collins on 29 September 2010, but that another verbal warning was given to 35 him by telephone on 25 November 2010 (as to which, see below). Mr Thurlow acknowledges that Herbert’s case is that these telephone calls did not take place but states that ‘HMRC are unable to comment as to why Mr Collins is unable to recall these conversations’.

6. Another point to note is that the PAYE due in respect of the month ended 5 May 40 2010 (£111,755.11) was paid 73 days late. This, however, was the first failure in respect of the tax year 2010-11 to make a payment of PAYE in full, on or before the

due date for payment, and, pursuant to paragraph 6(3), Sch 56, FA 2009, does not count as a default for that tax year.

5 7. The exclusion of the penalties originally charged in respect of the late payment of PAYE due in respect of the months ended 5 November 2010 and 5 April 2011 had the effect of reducing the number of defaults made by Herbert during the tax year 2010-11 (according to HMRC) from 8 to 6, which had the consequence of reducing the amount of the penalties charged from 3% of the amount of tax concerned (originally £25,247.67) to 2% of the (lower) amount of tax concerned (£13,688.54 – see, above, at paragraph 2). This is the effect of paragraph 6(5) and (6), Sch 56, FA 2009.

10 8. At the hearing of the appeal, Ms Plant, for Herbert, put her case in three alternative ways.

15 9. First, she submitted that Herbert is not liable to pay any of the penalties remaining in issue because all the delays in payment of PAYE concerned were covered by HMRC's agreement for deferral of payments with the result that there is no liability for penalties pursuant to paragraph 10(2) Sch 56 FA 2009.

20 10. Alternatively, she submitted that HMRC ought to have reduced the penalties remaining in issue (to nil) by reason of 'special circumstances' within paragraph 9, Sch 56 FA 2009, and invited the Tribunal to substitute for HMRC's decision not to reduce the penalties a decision to reduce them to nil. The Tribunal has power to make such a reduction only if it thinks that HMRC's decision was flawed, when considered in the light of the principles applicable in proceedings for judicial review (paragraph 15, Sch 56 FA 2009).

25 11. In the further alternative, she submitted that the Tribunal should be satisfied that there was a reasonable excuse for each of the delays in payment of PAYE giving rise to the penalties remaining in issue, with the consequence that no liability to penalty arises and the failures do not count as defaults for relevant purposes (see: paragraph 16, Sch 56 FA 2009).

12. Mr Hall, for HMRC, resisted the appeal on all three grounds.

30 13. We heard oral evidence from Mr John Oram, finance manager at Herbert, and Mr Tom Measures, officer in the Debt Management and Banking department of HMRC. Both witnesses also made witness statements, which were before us. We also had before us three bundles of relevant documents, in addition to a bundle of authorities.

The facts

35 14. From the evidence, we make the following findings of fact. Where we state evidence given, we should be understood to accept it unless the contrary appears later in this Decision.

40 15. Herbert is a family-run engineering business, which was incorporated in 1984. In 2010 it had 140 employees, mostly skilled. Its business was badly affected by the 2008 recession and in 2010 and 2011 it experienced problems in the provision of banking support, and eventually changed bankers.

16. Herbert has a history of good compliance with its tax obligations. However, in November 2009, a formal time to pay (“TTP”) agreement was approved by HMRC in relation to Herbert’s VAT liabilities for the VAT period 09/09.

5 17. Mr Oram provided answers to a corporate debt questionnaire put to him by HMRC on 7 May 2010 in requesting a TTP agreement in relation to a VAT liability of £136,141 for the VAT period 03/10. HMRC’s note is that Mr Oram stated at that time that there was no debt outstanding for PAYE and that Herbert had no payments arrangements for PAYE. Mr Oram said in evidence that he may have mentioned that
10 there was an outstanding debt for PAYE at this time and that HMRC did not make much of this, but he accepted that it would not have been correct to say that there was no debt for PAYE outstanding, though he made the point that some of the outstanding PAYE had been paid by that date (7 May 2010).

15 18. With effect from 6 April 2010, employers making late payments of PAYE became potentially liable to in-year penalties under the legislation introduced in Sch 56 FA 2009. Before that time, late payments of PAYE had generally not attracted any penalty.

20 19. HMRC publicised widely the forthcoming introduction of penalties for late payment of PAYE – for example in HMRC’s Employer Bulletin, issues 33 of September 2009, 35 of April 2010 and 37 of February 2010, and on HMRC’s website. However, Mr Oram did not read the relevant articles or consult the website.

25 20. A penalty default letter was issued by HMRC to Herbert in relation to late payment of PAYE on 28 May 2010, which warned Herbert (because of the late payment of PAYE due in respect of the month ended 5 May 2010) that Herbert ‘may be liable to a penalty if [it paid] late more than once in a tax year or if [it paid] late by six months or more’.

21. Mr Oram took little or no notice of this letter, because he thought he had an arrangement with HMRC for the payment of PAYE, through his dealings with Officer Measures.

30 22. These dealings were as follows. In around November 2009, Mr Oram first started to deal with Officer Measures, who was (and was at the time of the hearing of the appeal) a ‘field force agent’ for HMRC. He had responsibility for collecting outstanding debts for taxes from taxpayers as instructed by HMRC. Officer Measures’s evidence is that he visited Herbert on several occasions and dealt with Mr Oram. Mr Oram says that he had a close working relationship with Officer Measures,
35 which continued until Herbert got back into the situation where it could meet its tax obligations on time – which was towards the end of the tax year 2010-11, in about January 2011. After this time he had no more dealings with Officer Meadows.

40 23. Officer Meadows’s evidence, as given in his witness statement, was that he collected payment in full of actual overdue tax liabilities from Herbert, normally by cheque, on each visit he made. He said there were no formal TTP agreements in place with Herbert at these times and no letters of confirmation of any such agreements. He

recalled one occasion where 2 months' PAYE was outstanding and from memory he recalled that he collected one month's liability and gave 7 to 10 days to clear the other month's liability. He made the point that any formal TTP agreements would have had to be authorised by a higher grade officer, and his recollection was that this did not occur. However, Officer Measures did not say that he had told Mr Oram, or anyone else at Herbert, about the need for authorisation of formal TTP agreements.

24. Officer Measures's oral evidence was that he was not aware of any informal TTP agreements in force covering Herbert's PAYE obligation in the tax year 2010-11, but he could not categorically say either that there were or that there were not such informal agreements in force. He accepted in cross-examination that Mr Oram probably did have conversations with him about future months' PAYE debts, but his evidence was that he only dealt with the outstanding debts on his list (provided to him by HMRC) at any one time.

25. There was evidence from HMRC's records that telephone contact from the 'telephone pursuit unit' was also made with Herbert and that sometimes Mr Oram was spoken to, and sometimes his junior colleague, Mr Mark Collins. Mr Oram confirmed that he had sometimes spoken to the 'telephone pursuit unit' and sometimes to Officer Meadows on a mobile phone number which the officer had left with him.

26. HMRC's records contain a note dated 26 July 2010 that the case had been 'allocated to FFA, Tom Measures, for call w/e 30th July',

27. HMRC had records of two telephone conversations with Mark Collins, one on 29 September 2010, and one on 25 November 2010. The note of the conversation on 29 September 2010 records Mr Collins promising that the payment for month 5, that is, the month ended 5 September 2010, would be paid on 1 October 2010 by cheque. (The payment was made on or around that date.) The note of the conversation on 25 November 2010 was to the effect that Mark Collins "(Fin Dir)" (i.e. financial director) had advised that a payment for month 7 (the month ended 5 November 2010 in respect of which no penalty is claimed) of £136,727.50 had been paid by cheque on 22 November 2010. The note goes on: 'Educated about in-year penalties WLAP' – that is, warning of local action. Ms Plant told us that no-one at Herbert had any recollection of this telephone call and that in any case Mark Collins was not the financial director, but (as stated above) an office manager or accounts clerk.

28. Herbert received a 'Notice requiring payment' letter relating to overdue PAYE for the month ended 5 July 2010, which was dated 6 August 2010. An amendment to this letter was sent on 9 September 2010. Neither version included any wording warning Herbert about penalties accruing under Sch 56 FA 2009. Mr Oram's evidence was that he thought that late payment of the outstanding debt (actually £89,919, which was paid on 4 September 2010) was covered by an agreement reached with Officer Measures.

29. Mr Oram's dealings with Officer Meadows were entirely verbal. They were facilitated by Officer Measures leaving with Mr Oram a mobile telephone number on

which he could be contacted. Mr Oram's evidence was that Officer Measures assisted by agreeing flexible payments and allowing extra time to pay. He said:

5 'If we had a problem in making a payment, we would ring, in advance of the payment due, the officer [Officer Meadows] as we had a good working relationship. He sometimes said for example "I will not be round until the following Tuesday so you are OK till then". We were never warned of penalties during these contacts. This continued for a period of time and which as far as I was aware included the early months of 2010-11.'

10 30. Mr Oram's evidence was that the final payment made for the tax year 2009-10 was paid on 8 July 2010 (and recorded as received by HMRC on 10 July 2010) by which time Officer Measures had been discussing with Herbert the payments for the tax year 2010-11. He said that the cheque for months 1 and 2 of 2010-11 (ended 5 May and 5 June 2010) was collected by Officer Measures on 27 July 2010. This is consistent with HMRC's evidence which shows receipts of the PAYE for those months on 31 July 2010, and with Officer Meadows's evidence as set out above.

15 31. There was, however, one document which Mr Oram was able to produce in support of his evidence. This was a note made by him on 19 January 2010 and records an agreement with Officer Meadows that Herbert would pay its PAYE liabilities for the months ended 5 November 2009 to 5 April 2010 at various extended dates (although it appears to have been anticipated that the payment for the month
20 ended 5 April 2010 would be made on time).

25 32. HMRC accepted at a late stage (their letter dated 15 August 2012) that an effective TTP agreement (although informal) had been made on that occasion, but they point out that the tax periods covered were all in the tax year 2009-10. HMRC also accept that 'it is unfortunate that the Field Force Officer did not warn of penalties' but make the point that, from information sent to Herbert and what was available on HMRC's website, Herbert should have been fully aware of the consequences of paying PAYE for tax periods in the tax year 2010-11 late.

The submissions

30 33. Mr Hall, for HMRC, submitted that Herbert could not rely on paragraph 10(2), Sch 56 FA 2009 because there had been no agreements for the purposes of that paragraph that payments of PAYE for 2010-11 could be deferred. In particular, he submitted that the note made by Mr Oram on 19 January 2010 did not support Herbert's claim that there had been any agreements reached to the effect that any payments of PAYE due in the tax year 2010-11 could be deferred.

35 34. He submitted that there were no special circumstances within paragraph 9, Sch 56 FA 2009, to which the Tribunal could or should have regard, particularly given the Tribunal's restricted power in that respect under paragraph 15, Sch 56 FA 2009.

40 35. As to whether Herbert could show a reasonable excuse within paragraph 16 Sch 56 FA 2009 for its failure to pay on time the debts for PAYE in issue, Mr Hall reminded the Tribunal that an insufficiency of funds is not a reasonable excuse unless attributable to events outside Herbert's control (paragraph 16(2)(a), Sch 56 FA 2009). He submitted that Mr Oram's failure to read the publicity material disseminated by

HMRC in relation to penalties for late payment of PAYE, and his ignoring of the penalty default letter issued on 28 May 2010, had led to the late payments which had been penalised and Herbert had not been able to show any reasonable excuse in relation to them. He referred the Tribunal to the decision of the First-tier Tribunal in
5 *Rodney Warren & Co v HMRC* [2012] UKFTT 57 (TC) that a failure by HMRC to give warning of the penalty regime could not be a reasonable excuse for an appellant's defaults.

36. Mr Hall submitted that an honest and genuine belief on Mr Oram's part that he had made a relevant agreement or agreements to defer payment of the PAYE in issue
10 with Officer Measures was not, of itself, a reasonable excuse for the late payments. He submitted that Mr Oram ought to have considered how objectively likely it was that he had made such an agreement or agreements – and, presumably, ought to have concluded that it was not reasonably likely that he had.

37. Mr Hall stopped short, however, of suggesting that Mr Oram did not have an honest and genuine belief that he had made such an agreement or agreements with
15 Officer Meadows and 'did not wish to take further' a submission that such a belief did not provide a reasonable excuse.

38. Ms Plant submitted that we should accept Mr Oram's evidence. Herbert had been trading in difficult circumstances and had done its best to keep abreast of its tax
20 payments (both VAT and PAYE). Mr Oram's dealings with Officer Measures should be recognised as having brought about informal TTP agreements in respect of PAYE due in the tax year 2010-11, despite the lack of paperwork. She made the point that paragraph 10, Sch 56 FA 2009 does not require TTP agreements to be in writing, although she agreed that paragraph 10 does not relieve from penalty any late payment
25 made under a TTP agreement reached after the due payment date. She also made the point that HMRC's own procedures stress that when a TTP 'payment promise' is made and HMRC can informally agree to withhold recovery action for a short period to allow payments to be made in accordance with the promise, without the issue of TTP agreement letters, then HMRC should remind the taxpayer about penalties, etc.
30 and that this had never been done in Herbert's case (she referred to HMRC Manual reference DMBM800025).

39. She referred us to *The Copperfield Restaurant v HMRC* [2012] UKFTT 286 (TC), in which the Tribunal had found as a fact that a TTP agreement continued throughout the period of default (in relation to VAT) and had held that the onus was on HMRC to
35 prove defaults. She also referred us to *Cornwallis Care Services Ltd v HMRC* [2012] UKFTT 724 (TC) where the Tribunal found that reliance on information or guidance from HMRC which turns out to be misleading constituted a reasonable excuse (in a context of late PAYE payments). She also referred us to *Bale Group Limited v HMRC* [2013] UKFTT 139 (TC), where the Tribunal, on similar facts to the present
40 case, found (*ibid.* at [37]) that the HMRC officer who visited the appellant had lulled the appellant into a false sense of security by accepting the dates the appellant agreed to pay the PAYE without mentioning that payment on those late dates would give rise to a penalty.

40. She submitted that the Tribunal ought to recognise as ‘special circumstances’ within paragraph 9, Sch 56 FA 2009 the losses incurred by Herbert since 2009, the lack of support received by it from its bankers, the sudden deaths of two directors (in May 2007 and January 2010) and the ongoing relationship between Mr Oram and Officer Meadows.

Discussion and Decision

41. We deal in turn with the three alternative ways in which Ms Plant puts the case for Herbert.

42. Paragraph 10 of Sch 56 FA 2009 appears under the heading: “Suspension of penalty during currency of agreement for deferred payment”. It provides as follows:

‘10(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.’

43. In paragraph 10, ‘P’ of course is a reference to a person who may be liable to a penalty by reason of his or her (or its) failure to pay an amount of a specified tax (see: paragraph 1(1), Sch 56 FA 2009). In our application of paragraph 10, ‘P’ is a reference to Herbert.

44. It is noteworthy that paragraph 10 does not require an agreement for deferred payment to be in writing. There must, however, be an agreement (on HMRC’s part) following a request by P that payment of a specific amount of tax be deferred (paragraph 10(1)(b) and (c)).

45. The consequence of an agreement for deferred payment within paragraph 10 is that P incurs no liability to a penalty by reason of a failure to pay the specific amount of tax concerned at any time between the date on which P makes the request referred to in paragraph 10(1)(b) and the end of the agreed 'deferral period' – see: paragraph 5 10(2). This means that a failure to pay the specific amount of tax concerned when it becomes due and payable *before* the date on which P makes the request is not protected by paragraph 10. In other words, paragraph 10 gives effect to agreements for deferred payment reached *before* the specific amount of tax concerned has become due and payable. This was common ground between Herbert and HMRC.

10 46. The note made by Mr Oram on 19 January 2010, although it refers to PAYE liabilities due in 2009-10 and not 2010-11, is significant in two respects. First, it is accepted by HMRC to have evidenced that an effective (although informal) deferred payment agreement had been made (in relation to payments due in 2009-10). Secondly, it referred to PAYE liabilities for months both before and after January 15 2010. It was accepted to record an agreement reached between Mr Oram and Officer Measures and is therefore evidence of the fact that Officer Measures did, at least on that occasion, agree deferred payment of debts not already due – that is, debts beyond those on his list that he had been instructed by HMRC to collect.

47. Although we accept that formal TTP agreements would have had to be authorised 20 by a higher grade officer, rather than Officer Meadows, we find that Officer Meadows at no time told Mr Oram of this fact.

48. Officer Meadows accepted that Mr Oram probably did have conversations with him about future months' PAYE debts and we find, in accordance with Mr Oram's recollections, that those conversations covered the debts due for PAYE for the months 25 ended 5 May, 5 June and 5 July 2010 and that, through Mr Oram, Herbert made requests for those specific amounts of tax to be deferred. We also find, on the balance of probabilities, that Officer Measures agreed that those payments could be deferred for periods at the end of which Herbert actually made the relevant payments. We further find that the agreements so made were made before the respective amounts of 30 tax had become due and payable.

49. The evidence in relation to the debts due for PAYE for the months ended 5 August, 5 September and 5 December 2010 and 5 January 2011 is vaguer. As stated above, HMRC's records contain a note dated 26 July 2010 that the case had been 35 'allocated to FFA, Tom Measures, for call w/e 30th July' and we find that a further informal agreement for deferred payment of the PAYE prospectively due in August, and possibly later months, was made between him and Mr Oram.

50. Again, as stated above, HMRC's records also contain a note dated 29 September 2010 to the effect that Mr Collins had made a 'payment promise' relative to month 5, that £110,658.04 would be paid on 1 October 2010. This corresponds to the payment 40 for the month ended 5 September 2010, which was paid at about that time. We find that this payment, and on the balance of probabilities, the payment for the month ended 5 August 2010 also, was made pursuant to an informal agreement for deferred payment within paragraph 10, Sch 56 FA 2009. We regard our findings so far as

being consistent with HMRC's decision in Mr Thurlow's letter dated 15 August 2010 to accept that HMRC had a reasonable excuse for the late payment of PAYE due in respect of the month ended 5 November 2010. Herbert was acting on the honestly held basis that it had secured deferral agreements with HMRC through Officer Measures and, in our judgment, it had secured informal but valid deferral agreements. Certainly its belief that it had secured such agreements constitutes in our judgment a reasonable excuse not only for the late payment of PAYE due in respect of the month ended 5 November 2010 but also for the late payments of PAYE due in respect of the months ended 5 June, 5 July, 5 August and 5 September 2010 – see: below, paragraph 60.

51. The note dated 25 November 2010 on HMRC's records was (again, as stated above) to the effect that Mark Collins "(Fin Dir)" (i.e. financial director) had advised that a payment for month 7 (the month ended 5 November 2010 in respect of which no penalty is claimed) of £136,727.50 had been paid by cheque on 22 November 2010. The note goes on: 'Educated about in-year penalties WLAP' – that is, warning of local action.

52. Ms Plant told us that no-one at Herbert had any recollection of either of these telephone calls and that in any case Mark Collins was not the financial director, but an office manager or accounts clerk.

53. Nevertheless, as we received no evidence from Mr Collins, and HMRC's records appeared to be reliable on the point, we find that such conversations did take place, and that, importantly, Herbert were 'educated' about the penalty regime under Sch 56 FA 2009 at the latest on 25 November 2010. We therefore find on the balance of probabilities that the payments for the months ended 5 December 2010 (made 5 days late) and 5 January 2011 (made 13 days late) were not covered by any agreement for deferred payment, informal or otherwise, Herbert having at this stage been 'educated' as to HMRC's formal requirements in relation to agreements for deferred payments.

54. We go on to consider whether any special reduction is due in respect of the penalties imposed in relation to the late payments of PAYE for the months ended 5 December 2010 and 5 January 2011, pursuant to paragraph 9, Sch 56 FA 2009.

55. Paragraph 9, Sch 56 FA 2009, under the heading 'Special reduction', is in the following terms:

'9(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 overpayment 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.’

56. We bear in mind that HMRC’s decision that no reduction ought to be made under this paragraph cannot be set aside by us unless we consider it was flawed, when
5 considered in the light of the principles applicable in judicial review proceedings – that is, that it was a decision that no reasonable body of Commissioners, properly instructed in the relevant law, could have made. Ms Plant argues that HMRC’s decision not to recognise as ‘special circumstances’ within paragraph 9, Sch 56 FA 2009, the losses incurred by Herbert since 2009, the lack of support received by it
10 from its bankers, the sudden deaths of two directors (in May 2007 and January 2010), and the ongoing relationship between Mr Oram and Officer Measures should be regarded as flawed in the light of those principles.

57. We do not agree. It is clear that the scheme established by Sch 56 FA 2009 encourages agreements for deferred payment in circumstances which are difficult
15 (financially) for persons liable to make payments of PAYE. We would regard Mr Oram’s dealings with Officer Measures and his honest and genuine belief that he had made deferment agreements with HMRC through him as ‘special circumstances’ to which HMRC ought to have had regard in relation to the late payments of PAYE for the months ended 5 June, 5 July, 5 August and 5 September 2010. However, whereas
20 Herbert was unaware of HMRC’s formal requirements for agreements for deferred payment up until 25 November 2010 at the latest, we find that it was or ought reasonably to have been aware of HMRC’s requirements (and therefore of the basis on which such agreements would normally be entered into by HMRC) after that date. We discern no ‘special circumstances’ in relation to the late payments of PAYE for
25 the months ended 5 December 2010 and 5 January 2011. Paragraph 9 excludes specifically ‘ability to pay’ from constituting ‘special circumstances’ and the deaths of the directors took place significantly earlier than the times when the payments for the months ended 5 December 2010 and 5 January 2011 became due and payable. Finally, we cannot regard as flawed, HMRC’s decision not to regard the lack of
30 support received by Herbert from its bankers as ‘special circumstances’. This factor comes within the overriding concept of ‘ability to pay’. Ms Plant’s submissions in relation to paragraph 9, Sch 56 FA 2009, are accordingly rejected in relation to the late payments for the months ended 5 December 2010 and 5 January 2011.

58. We also reject her submission that Herbert had a reasonable excuse for the late
35 payments of PAYE for the months ended 5 December 2010 and 5 January 2011.

59. Paragraph 16, Sch 56 FA 2009, under the heading “reasonable excuse” was (at the relevant time) in the following terms (again, ‘P’, in the context of this case, refers to Herbert).

40 ‘16(1) Liability to a penalty under any paragraph of this Schedules 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

5 (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 reasonable excuse if the failure is remedied without unreasonable delay after the excuse ceased.'

60. Although, as accepted by HMRC, Mr Oram had an honest and genuine belief that he had made informal deferment agreements with Officer Meadows, we find that such
10 belief cannot assist Herbert in relation to any time after the telephone call from HMRC to Mr Collins on 25 November 2010, with its 'education' about the in-year penalties regime. Although we accept that Mr Oram's belief that he had made informal deferment agreements with Officer Meadows ranks as a reasonable excuse in relation to the late payments of PAYE for the months ended 5 June, 5 July, 5 August
15 and 5 September 2010, we find that Herbert did not have a reasonable excuse based on that belief or otherwise at any time after 25 November 2010. We find on the evidence that Herbert has not established a reasonable excuse for the late payments of PAYE due for the months ending 5 December 2010 and 5 January 2011.

61. We accordingly allow the appeal in part, quashing the penalties in respect of
20 PAYE due for the months ending 5 June, 5 July, 5 August and 5 September 2010, but upholding penalties in respect of the PAYE due for the months ended 5 December 2010 and 5 January 2011.

62. This will require a recomputation of the penalties due, under paragraph 6, Sch 56
25 FA 2009. Because the number of defaults made by Herbert is, by reason of our decision, reduced from 6 to 2, the amount of the penalty is 1%, not 2%, of the amount of the tax comprised in those total of those defaults (see: paragraph 6(4) Sch 56 FA 2009). Our calculation is that the amount of the penalties due is reduced from £13,688.54 to £2,262.42 (1% of £226,242).

Further appeals

30 63. 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
35 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

40 **JOHN WALTERS QC**
TRIBUNAL JUDGE

RELEASE DATE: 11 December 2013