TC03362

Appeal number: TC/2012/09169

INCOME TAX – PAYE – penalty for late payment – Schedule 56 FA 2009 – financial difficulties – allocation of payments – conduct of HMRC – special circumstances – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

KNOWLES WARWICK LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN
MR RICHARD CROSLAND

Sitting in public in Bradford on 8 January 2014

Mrs Michelle Howe of Knowles Warwick Limited appeared for the Appellant

Ms Joanna Bartup of HM Revenue & Customs appeared for the Respondents

DECISION

Background

1. The Appellant is a firm of chartered accountants practising in Sheffield. In this appeal it is challenging a penalty for failure to pay PAYE on time in tax year 2011-12. The total amount of the penalty in issue is £3,124.62. It has been assessed under Schedule 56 Finance Act 2009 ("FA 2009").

2. The broad basis on which the appellant challenges the penalty is that the respondents ("HMRC") ought to have allowed a special reduction pursuant to Paragraph 9 Schedule 56. It argues that there are "special circumstances" which engage that provision.

3. The appellant made a point of disavowing any reliance on Paragraph 16 Schedule 56 which provides that liability to a penalty will not arise where there is a reasonable excuse for a failure to make payment.

4. The issue on this appeal is whether we are satisfied that HMRC's decision that there are no special circumstances to justify reduction of the penalty was flawed.

Background Facts

5. The following background was not in dispute and we accordingly make the following findings of fact.

6. The appellant was liable to make payments of PAYE and NIC in the region of £12,000 per month in tax year 2011-12. It made payments electronically by BACS. Each payment was due to be made on the 22nd of the month following the tax month in which wages and salaries were paid (see Regulation 69(1)(b) Income Tax (PAYE) Regulations 2003). For these purposes a tax month is treated as ending on the 5th day of the calendar month. The following table was agreed and details of the payments made during 2011-12 were as follows:

Month Ending	**Due Date**	**Payment Date**	**Amount £**	**Days Late**
5 May 11	22 May 11	4 Jul 11	12,493	43
5 June 11	22 June 11	8 Aug 11	11,810	47
5 July 11	22 July 11	22 Aug 11	11,694	31
5 Aug 11	22 Aug 11	9 Sept 11	12,122	18
5 Sept 11	22 Sept 11	10 Oct 11	12,046	18
5 Oct 11	22 Oct 11	1 Dec 11	11,048	40
5 Nov 11	22 Nov 11	16 Dec 11	11,090	24
5 Dec 11	22 Dec 11	30 Dec 11	11,537	8
5 Jan 12	22 Jan 12	6 Feb 11	11,552	15
5 Feb 12	22 Feb 12	1 Mar 11	11,563	8
5 Mar 12	22 Mar 12	3 Apr 11	11,450	12

7. We set out below the material facts relied on by the appellant in claiming a special reduction and make relevant findings of fact. Before doing so, we set out the relevant provisions of Schedule 56 FA 2009.

The Penalty Regime

8. Schedule 56 FA 2009 makes provision for the imposition of penalties for late payment of certain taxes. By paragraph 1 those taxes include amounts payable under the PAYE regulations. The penalty is stated to be payable by a person "P" who fails to pay PAYE on or before the date determined by or under PAYE regulations as the date by which the amount must be paid.

9. Paragraph 6 provides as follows:

> " (1) P is liable to a penalty, in relation to each tax, of an amount determined by reference to –
>
> (a) the number of defaults that P has made during the tax year (see sub-paragraphs (2) and (3)), and
>
> (b) the amount of that tax comprised in the total of those defaults (see sub-paragraphs (4) to (7))
>
> (2) For the purposes of this paragraph, P makes a default when P fails to make one of the following payments … in full on or before the date on which it becomes due and payable –
>
> (a) a payment under PAYE regulations;
>
> (b) a payment of earning-related contributions …
>
> …
>
> (3) But the first failure during a tax year to make one of those payments … does not count as a default for that tax year.
>
> …
>
> (8) For the purposes of this paragraph –
>
> (a) …
>
> (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."

10. Paragraphs 6(4) to (7) provide for incremental penalties depending on the number of defaults during the tax year. The penalty is 1% of the amount of tax comprised in the defaults where there are 1-3 defaults in the tax year, 2% in the case of 4-6 defaults, 3% in the case of 7-9 defaults and 4% in the case of 10 or more defaults. The first failure to make a payment in a tax year does not count as a default.

11. It can be seen that paragraph 6(1) creates the liability to a penalty. Paragraph 11 deals with the assessment of that penalty. We shall deal with that paragraph now

before returning to paragraphs which deal with ways in which the penalty may be avoided or reduced.

12. Paragraph 11 provides:

> "(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."

13. Paragraph 11(1) confers no discretion on HMRC. If a person is liable to a penalty HMRC must assess it.

14. Paragraph 9 deals with the special reduction:

> " (1) If HMRC think it right because of special circumstances, they may reduce the 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."

15. Where HMRC think it right because of special circumstances they have discretion to reduce a penalty. That could include reducing the amount of a penalty to nil.

16. Paragraph 16(1) deals with reasonable excuse. It provides that the liability to a penalty does not arise if P satisfies HMRC or the tribunal that "there is a reasonable excuse for a failure to make a payment". In those circumstances the failure does not attract a penalty and does not count as a default. Subparagraph (2) provides that:

> "For the purposes of subparagraph (1) –
>
> (a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control…"

Jurisdiction

17. On the present appeal the appellant argues that the penalty ought to be reduced because of special circumstances. That is an appeal against the amount of the penalty and may be brought pursuant to Paragraph 13(2) Schedule 56. Paragraph 15(2) provides that on such an appeal the tribunal may affirm HMRC's decision or

substitute another decision that HMRC had power to make. However, if we substitute our decision, Paragraph 15 further provides as follows:

> "(3) …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."

18. The reference to judicial review makes it clear that the appellant must satisfy us that the decision taken by HMRC in relation to special circumstances:

(1) failed to take into account a relevant factor, or

(2) took into account an irrelevant factor, or

(3) was a decision which no reasonable body properly instructed as to the law could have reached.

19. It is not sufficient that we would have come to a different decision to that reached by HMRC.

Circumstances in which the Issue Arises

20. As we have stated, the issue on this appeal is whether we are satisfied that HMRC's decision that there are no special circumstances to justify reduction of the penalty was flawed.

21. The grounds of appeal lodged with the Tribunal on 2 October 2012 were all directed towards establishing a special reduction. However the decision letter dated 10 September 2012 which gave rise to the appeal had been directed to the question of whether there was a reasonable excuse for the defaults.

22. The appeal came before the First-tier Tribunal on 12 March 2013. On that date it was apparent that HMRC had not given consideration to the appellant's claim to a special reduction. The judge on that occasion (Judge Michael Tildesley OBE) adjourned the appeal and directed the appellant to set out in writing its detailed claim for a special reduction and for HMRC to provide its response. The appeal was then re-listed before us.

23. On 23 April 2013 the appellant sent a letter to HMRC setting out the detailed basis on which it claimed a special reduction. We can summarise the basis of the appellant's claim as follows:

(1) Special circumstances include the position where the strict application of the penalty regime produces a result that is contrary to the clear intention of penalty regime.

(2) The difficulties the appellant faced in its business and the effect of those difficulties on its financial position, together with various alleged failures by HMRC, gave rise to special circumstances to justify a reduction. Those failures are alleged to include a failure by HMRC to advise that payments should or could be allocated to current liabilities rather than accrued liabilities in relation to the previous tax year.

24. The letter set out the factual basis upon which the appellant relied in putting forward its claim. In addition, during the course of the appeal we heard evidence from Mr Steven Knowles, the appellant's managing director. That evidence substantiated and added further detail to the specific grounds relied upon in the letter.

25. By letter dated 20 June 2013 HMRC responded pursuant to the direction of Judge Tildesley. HMRC did not accept that there were any special circumstances to justify a special reduction. We do not need to rehearse the reasons given for that decision because they have formed the basis of Ms Bartup's submissions before us and we deal with those submissions below. Before doing so we make the following findings of fact based on the evidence before us.

Findings of Fact

26. The appellant is a firm of chartered accountants and as such it acts for and advises clients. Since 2008 it has helped clients through extremely challenging times, sometimes on a non-commercial basis.

27. In 2009 the appellant was itself under financial pressure. For example, in one month at the end of 2009 the bank said that it would not pay the staff wages unless £10,000 was introduced into the account. In fact the payment was made on the Friday payday and Mr Knowles borrowed £10,000 from friends and paid it into the account on the Monday. Thereafter the bank insisted that the appellant would have to keep within its overdraft limit, which in later periods stood at £85,000. The overdraft was supported by a personal guarantee from Mr Knowles. The result was that Mr Knowles had to keep a close eye on the account balance, especially at the end of the month when wages were due. Wages were always paid on time, but not always Mr Knowles' wages.

28. In January 2010 the appellant lost two major clients which between them accounted for 20% of the appellant's business. Losing clients in that way can impact significantly on an accounting practice because there is an immediate drop in income but the firm's cost base is to a large extent fixed.

29. In response to this set back, Mr Knowles planned to invest in and re-grow the business. One long standing member of staff had worked in corporate finance. There was little market for corporate finance services at the time and he was therefore tasked to carry out marketing for the firm generally.

30. In 2010 a member of staff was diagnosed with terminal cancer. The firm supported her for some 18 months and in 2012 she left the firm.

31. The firm had eight fee earners. In or about autumn 2010, two of the fee earners told Mr Knowles that they were pregnant and were intending to take maternity leave the following year. In the spring of 2011 a third fee earner also told Mr Knowles that she was pregnant and she too intended to take maternity leave later that year. All three did indeed take maternity leave.

32. In response to the situation Mr Knowles considered that it would be difficult to recruit suitable staff simply as maternity cover. The best people would not be attracted to such jobs. He therefore decided to recruit three further full time fee earners. This was consistent with his intention to grow the business, although it would mean increasing the cost base whilst finding new work. Each of those fee earners was on a salary of about £30,000 pa. There were also recruitment costs involved amounting to approximately 15% of salary. The appellant would have to pay maternity pay for the first 8 weeks of maternity leave. The new fee earners were recruited some two months or so before maternity leave commenced so that there could be a smooth handover of clients. There was therefore an additional cost that Mr Knowles described as "double shifting".

33. In order to finance the planned growth the appellant obtained a loan of £50,000 from Finance Yorkshire on the personal guarantee of Mr Knowles in the spring of 2011.

34. By spring 2012 Mr Knowles was starting to gain more confidence in the viability of the business. In August 2012 he was able to secure a second loan of £50,000 from Finance Yorkshire. From that date onwards finances were such that the appellant was able to meet its ongoing PAYE liabilities on time.

35. The plan to grow the business has been successful and since 2010 the size of the firm has doubled. By August 2012 Mr Knowles was confident that the firm was on a sound financial footing.

36. We can now describe the impact of these matters on the appellant's financial position, and in particular on its ability to comply with its PAYE obligations.

37. In the 7 years prior to 2011-12 every payment of PAYE was made late, save on one occasion. Penalties were introduced with effect from 2010-11 but no penalty was assessed on the appellant for defaults in that year. It was not clear why that should have been the case.

38. By the beginning of May 2011 the appellant had an accrued liability of £44,811 in relation to PAYE for 2010-11. The evidence is not entirely clear but it is likely that this related to the last four months of 2010-11 as follows:

Month	Amount Due £	Due Date	Payment Date
5 Jan 11	11,222	22 Feb 11	3 May 11
5 Feb 11	11,245	22 Mar 11	28 May 11
5 Mar 11	11,204	22 Apr 11	1 June 11
5 Apr 11	11,139	22 May 11	1 July 11

39. Mr Knowles wanted to pay off the earlier liability before making payments for the current year. The reason for this was that he was under pressure from HMRC to bring the previous year up to date. There was the likelihood of enforcement action by HMRC if the accrued liability was not paid, although in reality it would have taken some time for such action to be taken.

40. It can be seen therefore that in May and June 2011 the appellant was paying its accrued liability for 2010-11 at the expense of the 2011-12 liabilities which fell due in those months.

41. The penalty notice assessing a penalty for 2011-12 was issued on 10 July 2012. Thereafter, the appellant's PAYE payments were made on time. Whether that was because of the impact of the notice, or because the appellant received the second tranche of funding from Finance Yorkshire is not clear. The appellant was also able to reach an agreement with HMRC in relation to a VAT payment which had been due at the beginning of August which also helped the appellant's financial position.

42. It was only sometime after October 2012 that Mr Knowles and Mrs Howe realised that a different allocation might have been beneficial to the appellant in avoiding the penalty. Mrs Howe relied on what is said in the HMRC Debt Management manual at DMBM210105 which states as follows:

> " The customer always has the right to determine where their payment is allocated at the time of making payment. If they do, it should be allocated in accordance with the customer's wishes, whatever the circumstances or the debt.
>
> …
>
> Where exceptionally you feel the customers allocation would not be in their best interests, **for example because a different debt is about to be enforced**, you can suggest to the customer that it would be in their interests to allocate differently."
>
> (Emphasis added)

43. Mrs Howe has carried out an exercise which shows that if the appellant had paid its ongoing liability for 2011-12 rather than the accrued liability for 2010-11 then all current payments would have been made on time, save the payment for October 2011 due on 22 November 2011. The liability from 2010-11 would have been repaid by the

end of 2011-12. Ms Bartup did not dispute that this would have been the effect if a different allocation had been made.

44. There was considerable contact between the appellant and HMRC in relation to late payment of PAYE in the period from April 2009 to July 2012 which included time to pay arrangements, promises of payment, explanations for non-payment, and threats of distraint. We were taken by the parties to a few selected references in telephone logs maintained by HMRC. There was a time to pay arrangement in 2009-10 but there was no evidence of such an agreement in 2010-11 or 2011-12. Mr Knowles was also specifically warned of the risk of penalties on late payment of PAYE in telephone conversations on 25 February 2010 and again on 12 May 2010.

45. In addition there were various bulletins issued by HMRC to employers including the appellant from September 2009 onwards. Those bulletins describe the penalty regime under Schedule 56 which was to be introduced with effect from 2010-11. They do so in terms that from May 2010 "you may have to pay penalties" where payments are late. We do not think that an employer could fairly consider that this implied any encouragement to think that penalties might not be charged. More likely is that HMRC were taking into account that penalties would not be chargeable where there was a reasonable excuse for a default or where special circumstances might exist.

46. On 31 May 2011 there was a telephone call between Mr Knowles and HMRC Debt Management. At this stage Mr Knowles said that he believed there were 3 outstanding payments for 2010-11 together with the first month of 2011-12. He was hoping to be up to date by July. He agreed to send a payment summary but it is not clear whether he did so. There was certainly no mention of allocation at this time, or subsequently.

47. The monthly payroll of the appellant was between £28,000 and £35,000 per month resulting in a monthly PAYE liability in 2011-12 of approximately £12,000. The PAYE liability was paid by BACS. We had no documentary evidence, but Mr Knowles believed that when payment was made by BACS there would be a payment reference inserted by the bookkeeper.

48. The telephone contact between Mr Knowles and HMRC in relation to periods which were overdue clearly shows that the taxpayer had, at least in Mr Knowles' mind, allocated the payments to earlier liabilities. We are satisfied that the company intended and did allocate payments made in the period 3 May 2011 to 1 July 2011 to the 2010-11 liabilities.

Decision

49. Mrs Howe submitted that the purpose of penalties under Schedule 56 was to educate taxpayers. Historically, some employers had paid no PAYE during the year and had only made payment at the end of the year. That gave them an unfair advantage over compliant taxpayers. Penalties were introduced to create a level playing field.

50. It seems to us quite clear that penalties were introduced to help ensure compliance. They were not in themselves intended to educate taxpayers, although HMRC did take steps to make taxpayers aware of their responsibilities and the consequences of non-compliance.

51. Mrs Howe referred us to extracts from Hansard covering debates on the Finance Bill 2009. In particular she sought to identify an intention that penalties should not be triggered until 30 days after the due date for payment. In this respect she submitted that the penalties in respect of PAYE, which trigger a default even where payment is one day late, were inconsistent with the intention of Parliament.

52. Mrs Howe was unable to point to any ambiguity in the terms of Schedule 56 that would justify us considering extracts from Hansard. The intention of Parliament can only be derived from the wording of Schedule 56 itself. In the absence of any ambiguity it is not permissible to conduct a general review of Parliamentary debates to ascertain a different intention where the intention is clear from the statute - Pepper v Hart [1993] AC 593.

53. We must therefore focus in this appeal on whether there were special circumstances which might have justified a reduction in the penalty. Even that is not sufficient, because we must then go on to consider whether HMRC's decision that there were no special circumstances was flawed in the sense described above.

Meaning of Special Circumstances

54. We were referred to various HMRC manuals as to the meaning of special circumstances. In particular HMRC's compliance handbook states at CH170600:

> "… Special circumstances are either:
>
> - uncommon or exceptional, or
> - where the strict application of the penalty law produces a result that is contrary to the clear compliance intention of that penalty law."

55. HMRC's manuals reflect their view as to the meaning of the term special circumstances, but they do no more than that. They do not really assist us in ascertaining how the term should be construed. There is no authority as to the meaning of the term in the context of Schedule 56. However there was no real dispute between the parties as to what it meant.

56. In Clarks of Hove Ltd v Bakers' Union [1979] All ER 152 the House of Lords considered the meaning of "special circumstances" in the context of employment law. Geoffrey Lane LJ said that "… to be special the event must be something out of the ordinary, something uncommon …". Similarly, in Crabtree v Hinchcliffe [1971] 3 All ER 967 in the context of share valuations for the purposes of capital gains tax, Lord Reid said "'special' must mean unusual or uncommon – perhaps the nearest word to it in this context is 'abnormal'." In the same case, Viscount Dilhorne said "for circumstances to be special they must be exceptional, abnormal or unusual …".

57. Those cases have all been quoted and adopted by the First-tier Tribunal in the context of Schedule 56. See for example White v Commissioners of HM Revenue & Customs [2012] UKFTT 364 (TC). In the appeal before us both parties agreed that special circumstances will involve something unusual, exceptional, abnormal or out of the ordinary.

Existence of Special Circumstances

58. The appellant argues that the following matters, individually or taken together amount to special circumstances:

(1) The financial position of the appellant caused by the unexpected loss of major clients and abnormal costs incurred by the business in 2010 and 2011.

(2) The fact that if the appellant had allocated payments to ongoing liabilities rather than the accrued liability for 2010-11 then there would have been no penalty.

(3) The failure of HMRC to inform the business during 2011-12 firstly that it was incurring a liability for penalties and secondly that it could allocate payments so as to avoid a penalty.

59. The appellant argues that a taxpayer in the position of the appellant, with its director making personal sacrifices to ensure the future viability of the business, should not be subject to a penalty. Imposing a penalty would simply make future compliance more difficult. The appellant submitted that this could not have been the intention of Parliament and hence Parliament must have considered that this would amount to special circumstances.

60. We do not accept that any difficulty in future compliance caused by the imposition of a penalty is in any way inconsistent with the scheme of Schedule 56. In rare circumstances a penalty might be set aside as being disproportionate (see HMRC v Total Technology (Engineering) Ltd [2012] UKUT 418 (TCC) but that is not the position in the present appeal. It does not seem to us that the financial effect of a penalty of £3,124 in the present context could be described as disproportionate. Nor could the financial effect be considered as giving rise to special circumstances.

61. We accept that the appellant could not reasonably have anticipated that 3 out of 8 fee earners would all indicate within the space of 6 months from autumn 2010 their intention to go on maternity leave. The appellant also had to deal with the other challenges we have described above. We accept that the incremental effect of these matters contributed in large measure to the difficult financial position the appellant found itself in during 2011-12.

62. In considering whether there are special circumstances or whether there is a reasonable excuse for a default, the provisions in Schedule 56 are clear. Special circumstances do not include “ability to pay”. Inability to pay therefore falls to be considered in the context of reasonable excuse. Subject to the proviso that an “insufficiency of funds” is not a reasonable excuse “unless attributable to events outside [the taxpayer’s] control”.

63. It seems to us therefore that financial difficulties which cause a default can never, at least on their own, give rise to special circumstances. If anything, such financial circumstances may amount to a reasonable excuse but only where they are attributable to events outside the taxpayer's control.

64. We are satisfied that the appellant was right not to pursue an argument based on reasonable excuse. The difficulties described by the appellant are, whilst significant, simply part of the exigencies of business. It is notable that there was no suggestion the appellant had ever sought to agree a time to pay arrangement either in relation to the 2010-11 liabilities or those liabilities which gave rise to the penalties in 2011-12. The loss of clients occurred at the beginning of 2010 and the other difficulties occurred over a period of time from the end of 2010 onwards. The defaults with which we are concerned commenced in April 2011. The appellant had sufficient breathing space in which it could have sought a time to pay arrangement with HMRC, either in relation to the 2010-11 liabilities or the ongoing 2011-12 liabilities.

65. We do not accept, as suggested by Ms Bartup, that the appellant chose to expand at the expense of paying its tax on time. That is an over-simplification of the position. We have no doubt that throughout the period from 2010 to 2012 Mr Knowles was trying to balance the interests of employees, creditors and clients as best he could. We accept that there was no real possibility of the appellant obtaining further finance any earlier than the loans described above.

66. The facts suggest that the business was under-capitalised. It could not pay creditors as and when they fell due, in particular HMRC. Running a business involves difficult decisions and those decisions have implications for the business itself as well as for shareholders, employees and creditors. Those implications might include for example exposing the business to enforcement action, liabilities to interest and, in the case of HMRC, liability to penalties where creditors are not paid on time.

67. If the financial difficulties did not give rise to a reasonable excuse, it is difficult to see therefore how the inability of the appellant to make payment could give rise to special circumstances. There must be something more apart from inability to pay. In this case the appellant seeks to argue that it could have paid the sums falling due in 2011-12 if it had received advice from HMRC as to allocation.

68. On the basis that the financial difficulties do not amount to a reasonable excuse, they simply provide the background against which the appellant might argue special circumstances.

69. Mrs Howe relied on the Taxpayers' Charter which sets out what taxpayers can expect from HMRC in terms of respect, help and support, even-handed treatment, professionalism and integrity. In the light of the charter, Mrs Howe submitted that the appellant had been let down by HMRC. Firstly in relation to allocation and secondly in relation to warnings about penalties.

70. The question of allocation of payments by taxpayers to avoid or minimise liabilities has been considered by the First-tier Tribunal on a number of occasions. For

example in Kelcey & Hall Solicitors v Commissioners for HM Revenue & Customs [2012] UKFTT 662 (TC) the tribunal found that the taxpayer's allocation was not in their best interests and HMRC staff ought to have suggested a different allocation. It held that this amounted to special circumstances.

71. If there had been a different allocation in the present case, that would not necessarily have been beneficial to the appellant. In particular enforcement action could have been taken by HMRC. That is something that the HMRC Debt Management manual contemplates. The example it gives, referred to above, is that a taxpayer may wish to allocate payment to a debt which is about to be enforced. In the present appeal it is the reverse. The appellant submits that it ought to have been advised not to pay a liability which might be subject to enforcement action.

72. Therein lies the difficulty with the appellant's argument. Proper advice as to allocation would require a detailed scrutiny of the appellant's tax affairs and financial position. HMRC have enforcement powers which they are entitled to exercise. It is difficult to see why they should necessarily forego such action save in the context of a negotiated time to pay arrangement. The appellant was well aware that it could have negotiated time to pay with HMRC.

73. In the circumstances we do not consider that HMRC have any duty to advise a taxpayer as to the most beneficial allocation. The circumstances in which such a duty might arise, if at all, would be rare. For example if there was an assumption of responsibility by HMRC. See by way of analogy Neil Martin Ltd v Commissioners for HM Revenue & Customs [2007] EWCA Civ 1041 (not cited). On the facts of this appeal there could be no suggestion of any assumption of responsibility by HMRC.

74. Ms Bartup submitted that the appellant could not retrospectively change the allocation of payments once a penalty had been assessed. We accept that submission. However that is not what the appellant is seeking to do as we understand it. Rather the appellant relies on the failure of HMRC to advise at the time of the payments as to the possibility of a different allocation. In the absence of any duty on the part of HMRC to give such advice we do not accept that it can be criticised for failing to advise. It is the taxpayer, in this case a firm of chartered accountants, which must take responsibility for its own actions.

75. As to the fairness of HMRC not advising the most favourable allocation, notwithstanding it has no duty to do so, we adopt what was said by the First-tier Tribunal in AJM Mansell Limited v Commissioners for HM Revenue & Customs [2012] UKFTT 602 (TC) at [69]:

> " It cannot be part of the duty of a public body to advise employers not to comply with their legal obligation for one month, and instead allocate payments to the PAYE debts of a later month, in order that the company can avoid a penalty. We entirely reject the submission that HMRC acted unfairly."

76. It is clear that we cannot set aside a penalty simply because HMRC have acted unfairly. We have no such jurisdiction – see Commissioners for HM Revenue & Customs v Hok Ltd [2011] UKFTT 433 (TC).

77. In relation to fairness, we have found as a fact that the appellant was specifically warned as early as February 2010 that defaults could lead to penalties. As a firm of chartered accountants the appellant ought to have been aware of the penalty regime even without a specific warning. We do not consider that HMRC in any way "let the appellant down".

78. Even if we had been satisfied that the appellant was not aware of the penalty regime, that would not constitute special circumstances. See for example the discussion in Dina Foods Ltd v Commissioners for HM Revenue & Customs [2011] UKFTT 709 (TC) at [37].

79. The appellant argues that taken together the circumstances were abnormal or exceptional and amount to special circumstances.

80. We do not accept that the circumstances looked at as a whole amount to anything abnormal or exceptional. The appellant was in financial difficulties over an extended period. It was aware of the penalty regime, or at least ought to have been aware of it. If Mr Knowles had addressed his mind to the position he would have realised that a different allocation might have been beneficial and avoided penalties for 2011-12. However he would still have had to negotiate the position with HMRC in relation to the liabilities for 2010-11. In the absence of a time to pay arrangement there was always the possibility that HMRC would have used enforcement measures against the appellant if the arrears were not paid.

81. It follows, for the reasons given above, that HMRC were entitled to conclude that there were no special circumstances. They took into account all relevant factors as urged upon them by the appellant. They did not take into account any irrelevant factor. It cannot be said that their decision was in any way unreasonable or irrational. We are not satisfied therefore that their decision on special circumstances was flawed.

82. In the circumstances we must dismiss the appeal.

83. 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 25 February 2014