



TC03840

Appeal number: TC/2014/00334

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

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

QUARTET BOOKS LTD

Appellant

- and -

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

TRIBUNAL: JUDGE MICHAEL S CONNELL

The Tribunal determined the appeal on 17 April 2014 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the notice of appeal dated 10 January 2014 and HMRC's Statement of Case received by the Tribunal Service on 10 February 2014, the Appellant submitting no reply

DECISION

Introduction

5

1. This is an appeal against a penalty assessment (as amended) of £1,168.42 imposed under Schedule 56 of the Finance Act 2009 (“Schedule 56”) in respect of the late payment by the Appellant of monthly payments of PAYE and National Insurance contributions (“NICs”) in months of the year ending 5 April 2012.

10 2. The dates and amounts of the PAYE payments due and made are not in dispute. The appeal is based on whether the Appellant has a “reasonable excuse”.

Background

3. The Appellant is an independent book publishing company founded in 1972 and based in London.

15 4. From 6 April 2010, a new penalty regime was introduced by HMRC for late payment of monthly PAYE and NIC by employers. Previously, there was a mandatory electronic payment surcharge on large employers (those with over 250 employees). The surcharge ranged from 0% to 0.83% of the amount paid late and depended on the number of defaults in any one year. It was therefore possible for many employers to
20 delay payments to HMRC without incurring any material costs. Under Schedule 56 Finance Act 2009, however, this possibility was removed. Schedule 56 imposes penalties for late payment of PAYE. The legislation in relevant part is set out in paragraphs 13 - 25 below.

25 5. The penalties under Schedule 56 are based on a sliding scale as shown in the table below. The penalty varies as provided by paragraph 6, subparagraphs (4) to (7). The first default in any year is disregarded altogether. The remaining defaults trigger a penalty of 1%, 2%, 3% or 4% depending on their number. A 4% penalty is payable if there are ten or more defaults during the tax year.

No of failures	Penalty
1	no penalty providing the payment is less than six months late
2-4	1%
5-7	2%
8-10	3%
11 or more	4%

30 The penalty will not be levied if a) a time to pay agreement had been agreed in advance of the due date(s), b) if there are “special circumstances” in terms of paragraph 9 Schedule 56 or c) if the Appellant can establish that there was a reasonable excuse for each or any default.

6. The Appellant was late in paying its monthly PAYE and NICs to HMRC every month in the 2010-12 tax year. The first default month is disregarded. Following the decision in *Agar v HMRC* any default in month 12 does not crystallize in that tax year, but instead falls in the following year. Therefore there were a total of 10 defaults. HMRC produced for the hearing, a table showing the amounts of PAYE and NIC due for each of the relevant months, the penalty trigger date for each month, the date that payment was made for each of the months, and number of days that the payment was late in each of the 10 months in which payment was said by HMRC to have been late. The amounts, the due dates, the actual payment dates and the penalty amounts charged are set out in the table below.

PAYE and NIC due and paid late	Due Date	Days Late
£4,400.00	19.05.2011	disregarded
£2,740.45	19.06.2011	9
£3,570.53	19.07.2011	9
£2,931.50	19.08.2011	11
£2,936.41	19.09.2011	8
£2,936.41	19.10.2011	7
£2,936.40	19.11.2011	9
£2,936.01	19.12.2011	10
£2,936.41	19.01.2012	13
£2,546.40	19.02.2012	9
£2,740.03	19.03.2012	9
£0	19.04.2012	N/A
£29,210.55		

7. HMRC assessed a penalty at 4% of the total amount of defaults and notified it to the Appellant in a letter dated 14 March 2013. The Appellant appealed the decision on 30 April 2013. HMRC looked at the decision again but was unable to accept the Appellant's grounds of appeal. The Appellant asked HMRC for a review on 28 October 2013. By letter dated 4 December 2013 HMRC confirmed the decision. The Appellant appealed to the Tribunal on 10 January 2014.

8. The arguments in the Appellant's appeal to HMRC were that:

- (a) The penalty of 4% is disproportionate to the length of time the payments were late.
- (b) Had interest been charged on the amounts of time they were delayed then the interest rate would amount to approximately 133% for a payment being 11 days late.
- (c) The payments due by 19 July 2011, 19 August 2011 and 19 December 2011 were all submitted in time to be received by the respective due dates.
- (d) Further delays were due to bank holiday breaks, postal delays etc.

(e) The Appellant had entered into a payment arrangement for the previous year's PAYE and maintained regular payments for both the year in question and the current year at that time.

5 (f) The penalty is unjust at a time when the company was experiencing financial difficulties.

9. The Appellant's appeal to HMRC was not upheld and on 9 May 2013 a letter was issued explaining that there was no reasonable excuse for late payment. The reasons given were that:

10 (a) A reasonable excuse is normally an unexpected or unusual event, either unforeseeable or beyond a person's control, that prevented them from paying their PAYE on time and there had been no such events.

15 (b) The HMRC website provides full information on the penalties and methods of payment and advises of the dates that employers need to initiate payment by in order to avoid penalties. Details were also provided in extensive publicity both before and after the late payment penalties came into effect. Legislation and all employer external guidance state what the due dates for payment are. PAYE late payment penalties are intended to encourage more employers to pay by the due date

20 (c) The Appellant asked for time to pay but this only related to the 2010-11 tax year and the Appellant had not contacted HMRC to say they were experiencing any financial problems in the tax year 2011-12.

(d) The Appellant has been warned of penalties in telephone calls on 25 May 2011, 24 April 2012 and 5 March 2013.

25 (e) The penalty default warning letter was issued as a result of the first late payment and was issued to the Appellant on 27 May 2011. At this time the Appellant was not in a penalty situation because the first default does not attract a penalty unless it is 6 months or more late.

30 (g) The amount of penalty charged is relative to the amount of payments made after the due date. The Appellant was late every month for the tax year 2011-12 resulting in a penalty calculated at 4%.

10. On 30 October 2013 the Appellant's representative requested an independent Internal Review on the following grounds:

35 (a) The Appellant refuses to accept the penalty as a fair and equitable charge.

(b) Despite very difficult trading conditions in the book industry over the last few years debts have always been paid, albeit slightly late.

(c) The Appellant has made losses over several years and so has had to be supported by loans from the director.

40 (d) The director is actively considering closing the company down which will obviously place the staff on the unemployment list.

(e) The director has battled for many years to keep the company going but sees this as the last straw with the government not assisting small businesses at all.

5 (f) The actual interest rate on the late payments works out more like 133% per annum rather than the 4% headline rate.

(g) If this penalty is cancelled then the Appellant will ensure that all future payments are made on time.

10 11. HMRC's internal review concluded that the decision of 9 May 2013 should be upheld on the basis that there were no special circumstances that would allow HMRC to reduce the penalty. It was explained that:

15 (a) When the new penalty regime was enacted, following extensive consultation with external bodies, HMRC committed to implementing the regime first on a risk assessed basis. The Appellant was selected under this procedure and a penalty was found to be due. A review of the Appellant's records prior to the charging of the penalty gave no indication that there was any reasonable excuse for the defaults. It was acknowledged that the Appellant has always paid their PAYE but also confirmed that the Appellant had acknowledged that payments were also 'slightly late'.

20 (b) Most businesses experience cash flow problems as part of their normal cycle of business and they manage those difficulties as part of their day-to-day operations. A shortage of funds that is normal and can be anticipated is something HMRC expects a person to be able to manage, perhaps by arranging short-term finance. HMRC expects employers to take action to adjust their processes to enable them to pay their tax liabilities by the due date. Had the Appellant been experiencing difficulties, then HMRC would have expected them to contact HMRC to discuss their problems. Although records show that in April 2011 the Appellant requested a time to pay for 2010-11 underpayment, there is nothing during 2011-12 tax year that would indicate that the Appellant was having payment difficulties. No explanation was supplied as to why payment was late, or any indication provided that the Appellant was having payment difficulties.

35 (c) PAYE is money the employer deducts from employees on behalf of HMRC and it is not therefore theirs to use for other purposes in the interim period between deduction and payment. Employers who delay paying also have an unfair advantage over other employers who meet their statutory obligation to pay on time.

40 (d) There had also been a considerable amount of dialogue between the Appellant and HMRC during the default year.

a. HMRC contacted Mr Cochrane on 4 May 2010 to discuss the late payment for month 12 for 2009-10. During this

conversation he was reminded about the PAYE payment dates and was verbally warned about late PAYE penalties.

5 b. On 25 November 2010 HMRC contacted Mr Cochrane to discuss late payment. During this conversation Mr Cochrane agreed to send future payments by the 19th and a verbal late PAYE penalty warning was given.

10 c. On 24 May 2011 HMRC contacted Mr Cochrane to discuss late payment and he advised that he would ask Matthew Giles (accountant) to call HMRC back. During this conversation HMRC gave a further verbal warning about PAYE late payment penalties. There is nothing on record to indicate that Matthew Giles returned the call.

15 d. Two further verbal warnings were given in telephone conversations of 17 June 2011 and 24 April 2012.

(e) Warnings that were prior to the year for which PAYE penalties have been charged demonstrate that the Appellant would have been aware of the implications of late payment. It was the Appellant's responsibility to take heed of the verbal penalty warnings. Had the Appellant taken notice of these warnings then late PAYE penalties could have been avoided.

20 (f) In November 2008 HMRC set up the Business Payment Support Service to provide assistance to those businesses in temporary financial crisis. Records show that in April 2011 the Appellant contacted HMRC to request a time to pay arrangement for 2010-11 underpayment and this was agreed 17 June 2011. It is HMRC's belief that they have assisted the Appellant by allowing them to clear their outstanding 2010-11 PAYE by means of instalments.

25 (g) The structure and levels of penalty were considered and legislated by Parliament as those which would best improve future payment behaviour. The level of penalty increases with the number of defaults during the year.

30 (h) It is not enough to pay in full — it must also be on time. The Appellant had ten defaults during 2011-12.

35 (i) Records show that the cheque due 19 August 2011 was not dated until 21 September 2011, which was after the due date for payment. The cheques due for months 3 (due by 19 July 2011) and 8 (due by 19 December 2011) were dated 18 July 2011 and 19 December 2011 respectively.

40 (j) HMRC recommend allowing three working days for payment to reach them. The payment for month 3 was not received until 27 July 2011 and the payment for month 8 was not received until 31 December 2011, several days after the due dates for payment.

(k) HMRC have an obligation to operate to impose penalties in all cases where there is a reasonable belief they are merited by the facts. HMRC do not have the discretion to reduce PAYE late payment penalties unless it is found on appeal that they had a reasonable excuse for paying late.

5 (l) To date no evidence of reasonable excuse has been provided.

(m) The Appellant is still not paying on time. By continuing to pay late they remain at risk of incurring further PAYE late payment penalties.

10 (n) The Appellant is still paying by cheque. HMRC recommend employers make PAYE and NIC payments electronically. Paying electronically is a fast, secure and convenient method of payment and an employer would not need to be reliant on postal delivery to ensure payment is made on time.

12. On 10 January 2014 the Appellant appealed to the Tribunal.

The legislation

15

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

Paragraph 1 of Schedule 56 states as follows:

20 ‘(1) A penalty is payable by a person (“P”) where P fails to pay an amount of tax specified in column 3 of the Table below on or before the date specified in column 4.

(2) Paragraphs 3 to 8 set out—

25 (a) the circumstances in which a penalty is payable, and

(b) subject to paragraph 9, the amount of the penalty.

30 (3) If P’s failure falls within more than one provision of this Schedule, P is liable to a penalty under each of those provisions.

35 (4) In the following provisions of this Schedule, the “penalty date”, in relation to an amount of tax, means the date on which a penalty is first payable for failing to pay the amount (that is to say, the day after the date specified in or for the purposes of column 4 of the Table)’.

14. The table lists numerous various categories of taxes of which those referred to in items 1 and 2 (as shown in the extract from the Table below) are relevant to this appeal.

40

	<i>Tax to which payment relates</i>	<i>Amount of tax payable</i>	<i>Date after which penalty is incurred</i>
<i>PRINCIPAL AMOUNTS</i>			
1	Income tax or capital gains tax	Amount payable under section 59B(3) or (4) of TMA 1970	The date falling 30 days after the date specified in section 59B(3) or (4) of TMA 1970 as the date by which the amount must be paid
2	Income tax	Amount payable under PAYE regulations ...	The date determined by or under PAYE regulations as the date by which the amount must be paid
3	Income tax	Amount shown in return under section 254(1) of FA 2004	The date falling 30 days after the date specified in section 254(5) of FA 2004 as the date by which the amount must be paid

15. Regulations 67A and 67B of the Social Security Contributions Regulations (SI 2001/1004 as amended) provide that Schedule 56 applies also to Class 1 National Insurance contributions as if they were an amount of tax falling within item 2 of the above Table, and to Class 1A and Class 1B National Insurance contributions as if they were an amount of tax falling within item 3 of the above Table.

16. Paragraph 5 of Schedule 56 states that paragraphs 6 to 8 of Schedule 56 apply in the case of a payment of tax falling within item 2 or 4 in the Table.

17. Paragraph 6 of Schedule 56 states as follows:

10

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

15

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

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

20

(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--

25

(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);

30

(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 (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.
- 10 (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--
- 15 (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.
- 20 (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.'

25 18. Paragraph 9 of Schedule 56 allows HMRC to reduce a penalty if special circumstances exist.

Paragraph 9 states as follows:

- 30 '(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
- 35 (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--
- 40 (a) staying a penalty, and
- (b) agreeing a compromise in relation to proceedings for a penalty.'

45 19. Paragraph 10 of Schedule 56 states as follows:

- '(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

5 (c) HMRC agrees that payment of that amount may be deferred for a period ("the deferral period").

10 (2) If P would (apart from this sub-paragraph) become liable, between the date on which P makes the request and the end of the deferral period, to a penalty under any paragraph of this Schedule for failing to pay that amount, P is not liable to that penalty.

(3) But if--

15 (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),

20 P becomes liable, at the date of the notice, to that penalty.

(4) P breaks an agreement if--

25 (a) P fails to pay the amount of tax in question when the deferral period ends, or

30 (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.'

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

'11(1) Where P is liable for a penalty under any paragraph of this Schedule HMRC must--

40 (a) assess the penalty,

(b) notify P, and

(c) state in the notice the period in respect of which the penalty is assessed.'

45 21. Paragraphs 13-15 of Schedule 56 provide for appeals to the Tribunal against a decision of HMRC that a penalty is payable, or against a decision by HMRC as to the amount of the penalty that is payable. The Tribunal's powers are laid down in paragraph 15:

‘15(1) On an appeal under paragraph 13(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 13(2) that is notified to the tribunal, the tribunal may--

- 5 (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--

- 10 (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.

15 (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)).

20 22. As observed in *Dina Foods Limited*, [TC01546] under paragraph 15 the Tribunal is given power:

25 ‘to confirm or cancel the penalty, or substitute for HMRC's decision another decision, but only one that HMRC had the power to make. The Tribunal can only rely upon the "special circumstances" provision in paragraph 9 to a different extent than that applied by HMRC if it thinks that HMRC's decision in that respect was flawed. Applying judicial review principles, the Tribunal must consider whether HMRC acted in a way that no reasonable body of commissioners could have acted, or whether they took into account some irrelevant matter or disregarded something to which they should have given weight. The Tribunal should also consider whether HMRC have erred on a point of law.’

30

23. Under paragraph 16 of Schedule 56, the Appellant may escape liability for a penalty if the Tribunal is satisfied that there was a reasonable excuse. Paragraph 16 was amended by Schedule 11 of the Finance (No 3) Act 2010 (c, 33). As originally drafted, paragraph 16 provided that liability to a penalty did not arise in relation to
35 any failure for which there was a reasonable excuse. In the amended version, the paragraph also went on to say: “the failure does not count as a default for the purposes of paragraph 6...”. The effect of this change is therefore that, under the amended legislation, it is clear that defaults for which there is a reasonable excuse are not to be counted when fixing the appropriate rate of penalty to be charged.

40 Paragraph 16 of Schedule 56 states as follows:

‘(1) If P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for a failure to make a payment-

(a) liability to a penalty under any paragraph of this Schedule does not arise in relation to that failure, and

(b) the failure does not count as a default for the purposes of paragraph 6...

5

(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,

10 (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.'

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

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

25 '(1) the legislation became operative with a commencement date of 6 April 2010, so that the first time penalties could be raised under these rules was after the end of the 2010/11 tax year, given the way that the penalties talk in terms of the number of defaults during the year in question (at [11]);

30 (2) except in the case of special circumstances, the scheme laid down by the statute gives no discretion: the rate of penalty is simply driven by the number of PAYE late payments in the tax year by the employer (at [31]);

35 (3) the scheme of the PAYE legislation requires taxpayers to pay over PAYE on time; the legislation does not require HMRC to issue warnings to individual employers, though it would be expected that a responsible tax authority would issue general material about the new system (at [33]);

40 (4) lack of awareness of the penalty regime is not capable of constituting a special circumstance; in any event, no reasonable employer, aware generally of its responsibilities to make timely payments of PAYE and NICs amounts due, could fail to have seen and taken note of at least some of the information published and provided by HMRC (at [37]);

45 (5) any failure on the part of HMRC to issue warnings to defaulting taxpayers, whether in respect of the imposition of penalties or the fact of late payment, is not of itself capable of amounting either to a reasonable excuse or special circumstances (given that there is no separate penalty for each individual default, and the penalty can only be assessed once the aggregate of the late paid tax comprised in the total of the defaults for a particular tax year has been ascertained) (at [38]-[39]);'

.....

Evidence and submissions

26. HMRC's bundle of documents included copies of correspondence, records of telephone attendance notes, a summary of payment dates, HMRC notices, together with the materials by which the new penalty system had been publicised, copy relevant legislation, the Appellant's Notice of Appeal and HMRC's Statement of Case.

The Appellant's submissions

27. The Appellant's grounds of Appeal as stated in its Notice of Appeal are:
- (a) The payments for PAYE were always made in the same month, or shortly thereafter.
 - (b) The 'interest' charged is not reasonable.
 - (c) HMRC deducted or withheld a VAT repayment that was due.
 - (d) The Appellant was informed that as long as they made regular payments then no interest would be charged.
 - (e) The owner of the Appellant Company is over eighty and cannot obtain an overdraft for Quartet Books Limited, so is reliant on cash flow coming in.
 - (f) The Appellant company is loss-making and the owner has to subsidise it to keep people in employment

HMRC's submissions

28. Payments of PAYE are meant to be made in full and on time. Legislation states that payment should be made by the 19th of the month if paying by cheque, or the 22nd of the month if paying electronically for the month it is due. PAYE due dates are shown in HMRC's "Employers packs" and HMRC's "Paying Electronically P30 (b) letter". It has never been acceptable to pay late.
29. The penalty is not an interest charge. Penalties were introduced to encourage more employers to pay by the due date and the rates are set by legislation (Schedule 56 Finance Act 2009).
30. The penalty increases in line with the number of PAYE periods not paid on time. The higher the number of PAYE periods not paid on time the higher the penalty.
31. HMRC are under a legal obligation to impose a penalty in all cases where they have a reasonable belief that a penalty is merited by the facts. It would be unfair to administer penalties in any other way. The Appellant was notified that he may be liable to a penalty after the first default. The Appellant could have found details of the level of the penalty if he had accessed HMRC website — details were given on the

warning letter. By paying late the Appellant has an unfair advantage with those employers who pay on time.

32. The Upper Tribunal in *HMRC v Hok Ltd* [2012] UKUT 363 (TCC) determined that the First-tier Tribunal does not have jurisdiction to supervise the conduct of HMRC and, thus, has no power to determine whether the imposition of a penalty was unfair (see paragraphs 56-58 of *Hok*). The *Hok* decision is binding on this Tribunal.

33. HMRC respectfully suggests that the Tribunal cannot consider proportionality and relies on the UTT decision in *Total Technology Ltd*. The penalties are statutory, i.e. imposed by Parliament for a permissible purpose and no greater than is needed to secure compliance with filing and payment obligations. The Tribunal has no power to reduce penalties in the absence of a reasonable excuse.

34. There is no VAT record for Quartet Books Ltd, therefore there would be no VAT to withhold or deduct.

35. There is no evidence to show that the Appellant was informed that as long as they made payments no interest would be charged. In fact, prior to the penalties, records show that the Appellant was reminded of payment dates and warned of the possibility of penalties on numerous occasions. HMRC records show that from the 2005-06 tax year up to and including the current year the Appellant has only made one payment on time

36. On the question of cash flow, Para 16(2) of Schedule 56 specifically excludes insufficiency of funds as being a reasonable excuse. A lack of money is not in itself a reasonable excuse for a failure to make payments on time. In order to be a reasonable excuse, the lack of funds must have been due to unforeseeable events outside a person's control and been a direct or indirect cause of the failure.

37. Most businesses experience cash flow problems as part of their normal cycle of business. They manage those difficulties as part of their day-to-day operations. The majority of employers do pay on time, and paying late gives the Appellant an unfair commercial advantage. It is not enough to pay in full eventually —Parliament expects employers to pay on time. If the Appellant know they were going to have trouble paying they should have contacted HMRC prior to the due date. The Appellant is aware that they can ask for a payment plan as they have contacted HMRC before for a Time To Pay arrangement.

As Lord Donaldson MR said in *Customs and Excise Commissioners v Steptoe* [1992] STC 757 at 770:

“...if the exercise of reasonable foresight and of due diligence and a proper regard for the fact that the tax would become due on a particular date would not have avoided the insufficiency of funds which led to the default, then the taxpayer may well have a reasonable excuse for non-payment, but that excuse will be exhausted by the date on which such foresight, diligence and regard would have overcome the insufficiency of funds.”

In the First-tier tribunal case of *WM Hardill Sons & Co Ltd v HMRC* (TC01167), the Tribunal said:

5 “The adverse trading circumstances affecting the Appellant were not in dispute. We accept that the Appellant’s late payments were almost entirely due to cash flow pressures on its business. However as clearly stated in paragraph 6(2) (a) of Schedule 56, an insufficiency of funds does not qualify as a reasonable excuse. An inability to pay does not represent special circumstances, which might justify a reduction in a penalty. An exceptional or unforeseen event, which caused the insufficiency of funds, may to amount to a reasonable excuse but on the facts of this appeal there was no
10 such event. Something specific and related to the particular taxpayer is required. Adverse economic conditions and particularly late payments by customers, which happen on a regular basis, do not suffice. There were no unusual circumstances, which might have caused the insufficiency of funds. Since the imposition of the penalties the Appellant’s PAYE and NIC have largely been paid on time, which
15 clearly suggested that the Appellant could have similarly put in place measures to avoid late payments of PAYE and NIC in the default year.” [Judge Connell]

Conclusion

20 38. The onus is on HMRC to show default, but as the Appellant has accepted the payments were late it is for them to show why the penalty should not be charged. It is clearly not in dispute that the Appellant was required throughout the relevant year to make monthly payments of PAYE and NICs by the 19th day of each month. Nor is there any dispute as to the amount of PAYE and NIC required to be paid by the Appellant in each of the months in question. It is also accepted by the Appellant that
25 each of the payments in respect of which a penalty has been imposed was indeed late. There was also no dispute as to the calculation of the penalties apart from the potential application of paragraphs 9 and 16 of Schedule 56.

30 39. Under paragraph 11 of Schedule 56 HMRC has no discretion as to the imposition of the penalty. Further, the amount of the penalty is set down in paragraph 6 of Schedule 56, and if the tax-payer pays late, HMRC are obliged to impose the penalty.

35 40. The Appellant may have been unaware of the penalty regime but that does not constitute special circumstances. HMRC publicised the late payment penalties for PAYE and NICs extensively both before and after they came into effect. An employer pack including a CD-ROM was mailed to all employers in February 2010, flyers were mailed to employers and factsheets were distributed at face-to-face events (such as “Employer Talk” and published on the HMRC website). Late payment penalties also featured in issues of Employer Bulletin, on the PAYE pages of the website (and on a podcast), on Businesslink and in published guidance and employer help books. This
40 should have acted as an early warning to the Appellant that the penalty regime was about to change. HMRC made every effort to educate employers on the changes. There was also communication with accountants and other tax agents, and publication in local and national media. HMRC’s Employer Bulletins refer employers to HMRC’s website. The website makes the deadlines for payment quite clear:

‘PAYE/Class 1 NICs electronic payment deadline

Your cleared payment must reach HMRC's bank account no later than the 22nd of the month following the end of the tax month or quarter to which it relates.

PAYE/Class 1 NICs postal payment deadlines

5please ensure your cheque reaches HMRC no later than the 19th of the month following the end of the tax month or quarter to which it relates.’

41. It is standard practice for HMRC to send a warning letter on the first default advising that payment has been late and that any further late payments may incur a
10 penalty. The letter gives an internet address at which further information about the penalty regime could be found. The letter gives links to various web-pages where more information can be obtained. The letter also includes an offer to sign up to receive e-mail alerts as due dates approach, and informs the addressee to contact the business payment support service in the event of the employer being unable to pay
15 PAYE on time. The Appellant appears to have made little or no effort to acquaint itself of its obligations.

42. The Appellant has not demonstrated anything unusual or unexpected beyond problems encountered during the normal course of trade. The fact that the Appellant was consistently only days or a week or so late suggests that cash flow was not an
20 issue

43. The Tribunal is satisfied that there was an extensive campaign of advance publicity and that there was no reason why Appellant should not have been sufficiently alerted to the new penalty regime.

44. The Appellant received an initial Penalty Default Warning letter and numerous
25 enforcement warning letters. The first default would have attracted no penalty if there had been no further defaults for the remainder of the tax year. There was a considerable amount of contact with HMRC throughout the year about late payments of PAYE. There were numerous telephone conversations with representatives of the company. A reasonably prudent employer, aware of its responsibilities to make timely
30 payments of PAYE and NICs amounts, would have been prompted to make enquiries of HMRC to ascertain the cause of the problem and obtain information about the penalty regime.

45. In *Dina Foods*, at [40]-[42], the Tribunal considered whether the penalty was disproportionate, and said as follows:

35 ‘40. In its initial appeal letter and in its formal notice of appeal, the company referred to the penalty being excessive. It is clearly not excessive on the terms of Schedule 56 itself because the system laid down prescribes the penalties. Nonetheless, whilst no specific argument was addressed to us on proportionality, we have considered whether, in the circumstances of this case,
40 the 4% penalty that was levied on the total of the relevant defaults in the tax year can be said to be disproportionate.

5 41. The issue of proportionality in this context is one of human rights, and
whether, in accordance with the European Convention on Human Rights, *Dina*
Foods Ltd could demonstrate that the imposition of the penalty is an unjustified
interference with a possession. According to the settled law, in matters of
taxation the State enjoys a wide margin of appreciation and the European Court
of Human Rights will respect the legislature's assessment in such matters unless
it is devoid of reasonable foundation. Nevertheless, it has been recognised that
not merely must the impairment of the individual's rights be no more than is
necessary for the attainment of the public policy objective sought, but it must
10 also not impose an excessive burden on the individual concerned. The test is
whether the scheme is not merely harsh but plainly unfair so that, however
effectively that unfairness may assist in achieving the social objective, it simply
cannot be permitted.

15 42. Applying this test, whilst any penalty may be perceived as harsh, we do not
consider that the levying of the penalty in this case was plainly unfair. It is in
our view clear that the scheme of the legislation as a whole, which seeks to
provide both an incentive for taxpayers to comply with their payment
obligations, and the consequence of penalties should they fail to do so, cannot
be described as wholly devoid of reasonable foundation. We have described
20 earlier the graduated level of penalties depending on the number of defaults in a
tax year, the fact that the first late payment is not counted as a default, the
availability of a reasonable excuse defence and the ability to reduce a penalty in
special circumstances. The taxpayer also has the right of an appeal to the
Tribunal. Although the size of penalty that has rapidly accrued in the current
25 case may seem harsh, the scheme of the legislation is in our view within the
margin of appreciation afforded to the State in this respect. Accordingly we find
that no Convention right has been infringed and the appeal cannot succeed on
that basis'.

30 46. The Tribunal agrees with the observations made in *Dina Foods* as set out above.
The principles were endorsed by the later Upper Tribunal decision in *Total*
Technology (Engineering). The Tribunal does not consider the penalties to be
disproportionate to the defaults involved.

35 47. As stated in *Dina Foods*, the penalty regime may be harsh in order to act as a
deterrent, but it is not "unfair". The penalty scheme as laid down by the statute
provides no discretion (except where "special circumstances" apply, which was not
suggested here). The penalty rate rises in accordance with the incidence of default
and is a fixed percentage. The penalty cannot be excessive where it was correctly
40 assessed and calculated. We therefore follow *Dina Foods Limited*, at [40] to [42], and
Agar at [46] and find that the penalties raised were not disproportionate.

45 48. For the above reasons the Tribunal finds that the Appellant has not established a
reasonable excuse for any of the late payments, or that there were special
circumstances justifying a mitigation of the penalty. The penalty was not harsh or
disproportionate. It therefore follows that the appeal must be dismissed and the
penalties confirmed.

49. 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.

10

**MICHAEL S CONNELL
TRIBUNAL JUDGE**

RELEASE DATE: 24 July 2014

15