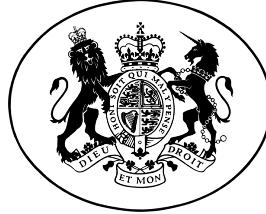
[2014] UKFTT 507 (TC)



TC03634

Appeal number: TC/2012/05784

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

FIRST-TIER TRIBUNAL
TAX CHAMBER

KEYMER HASLAM & CO **Appellant**

- and -

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

TRIBUNAL: JUDGE MICHAEL S CONNELL
MR LESLIE HOWARD

Sitting in public at 45 Bedford Square, London WC1B 3DN on 21 February 2014

The Appellant did not attend and was not represented

Ms Karen Weare, Officer of HM Revenue and Customs, for the Respondents

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DECISION

Introduction

1. This is an appeal by Keymer Haslam & Co ("the Appellant") against a penalty assessment of £4,624.60 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 ten months of the year ending 5 April 2012.

2. The Appellant did not attend the hearing and was not represented. The Appellant had previously written to the Tribunal to say that due to illness the partner who was to represent the Appellant would not be able to attend the hearing. The Appellant asked for the hearing to be adjourned. After giving the matter due consideration the Tribunal decided that an adjournment should not be granted and that it was in the interests of justice to proceed.

3. It was clear from the Appellant's correspondence with HMRC prior to the hearing that the amounts of the PAYE payments made late were not in dispute. The appeal was based on whether the Appellant had a "reasonable excuse". The Appellant argued that:

i) the penalty was disproportionate and unfair;

ii) the penalty was notified late;

iii) there had been no warning from HMRC of the possible severity of the penalty;

iv) the company had only been late by a few days making PAYE payments.

Background

4. The Appellant is a firm of Chartered Accountants based in Burgess Hill, West Sussex.

5. From 6 April 2010, a new penalty regime was introduced for late payment of monthly PAYE and NIC by employers. Under Schedule 56 Finance Act 2009, penalties are imposed for late payment of PAYE. The legislation in relevant part is set out below.

6. 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 - 3	1%

4 - 6	2%
7 - 9	3%
10 or more	4%

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.

5 7. The Appellant was late in paying its monthly PAYE and NICs to HMRC for every month in the 2010-11 tax year. 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 months in which 10 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 not paid on time	Due date	Days late/final balance paid
£11,450.82	19. 5.2010	9
£11,589.50	19. 6.2010	13
£11,840.52	19. 7.2010	11
£11,321.56	19. 8.2010	16
£11,389.27	19. 9.2010	11
£11,359.50	19.10.2010	8
£11,278.23	19.11.2010	1
£11,111.21	19.12.2010	5
£12,544.23	19. 1.2011	3
£11,765.70	19. 2.2011	6
£11,415.20	19. 3.2011	6

8. HMRC assessed a penalty at the 4% rate and notified it to the Appellant in a 15 letter dated 29 September 2011.

9. The Appellant replied on 17 October 2011 appealing the penalty, saying:

> (a) "the total amount of penalty, £4,624.60, is utterly disproportionate to the lateness of the payments received by HMRC. This disproportionality is contrary 20 to EU regulations. We enclose a schedule that sets out the effective annual rate of interest (APR) which is the universally recognised means of defining interest rates. As you should be aware, APR is used in all financial institutions and

recognised by Government as a tool to assess the reasonableness of charges. From the schedule, you will note that the APR for each monthly charge ranges from a minimum of 77% to a maximum of a stunning 1,460% - had this been a Bank raising such charges it would be headline news.

5 (b) 2010/11 was the first year that penalties had been charged for being late on a monthly basis. Whilst we accept that ignorance of new regulations does not of itself provide a reasonable excuse for making a mistake, it is also an accepted principle that HMRC should treat its 'customers' in a fair and reasonable manner.

10 (c) It took HMRC from the first month that we had inadvertently entered the penalty regime on 19 June 2010 until 29 September 2011 to bring it to our attention that we were incurring such substantial penalties on a monthly basis. If you had made this clear at the outset, we would of course have found a way to bring forward the payments required to avoid them. Although standard letters 15 were sent out by yourselves specifying that payments were received after the 19th of each month, they only, stated 'you may be liable to a penalty'. None of them explained that a penalty of, say, £451.13 had been incurred. As a result we continued in blissful ignorance, believing that we were meeting its PAYE deadlines.

20 (d) It is difficult to avoid a cynical view of the HMRC delay of 15 months in mentioning to a taxpayer that HMRC had quietly been accumulating lucrative penalties. Had we been warned after the first month of charge, not only would there have been no further late payments the rate for that single month would only have been 1%. By waiting until it was impossible for us to retrieve the 25 situation the penalty rate has increased to 4%. Furthermore, it must have been apparent this was not a deliberate non-payment policy on our part. If that had been the case, we would obviously have taken the full 6 months leeway until the next penalty was levied, rather than paying the liability. From the schedule enclosed it is evident we have improved and minimised the delay between the 30 due date and the actual payment date

(e) Concluding the arguments for reasonable excuse to be applied to eliminate the penalties of £4,624.60 charged, we remind you that HMRC's failure to draw the taxpayer's attention to the fact that a taxpayer had inadvertently entered a penalty regime, thereby substantially 35 increasing the amount of the penalty, has been the subject of condemnation in recent tax cases also relating to PAYE. It is suggested herein that HMRC apply the reasoning underlying the Judge's ruling in those cases to this one."

10. Following confirmation of the penalty on review by HMRC on 25 November 40 2011, the Appellant appealed to the Tribunal 23 May 2012. The grounds of appeal in the notice of appeal were that the penalty was disproportionate to the lateness of the payments.

The legislation

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

Paragraph 1 of Schedule 56 states as follows:

'(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—

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

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

(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.

(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)'.

12. 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.

	Tax to which payment relates	*Amount of tax payable*	*Date after which penalty is incurred*
PRINCIPAL AMOUNTS			
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

13. 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.

14. 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.

15. Paragraph 6 of Schedule 56 states 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

5 (b) the amount of that tax comprised in the total of those defaults (see sub-paragraphs (4) to (7)).

(2) For the purposes of this paragraph, P makes a default when P fails to make one of the following payments (or to pay an amount comprising two or
10 more of those payments) in full on or before the date on which it becomes due and payable--

(a) a payment under PAYE regulations;

15 (b) a payment of earnings-related contributions within the meaning of the Social Security (Contributions) Regulations 2001 (SI 2001/1004);

(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
20 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.

25 (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.
30

(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--
35

(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
40 remedied before the end of the tax year.

(9) The Treasury may by order made by statutory instrument make such amendments to sub-paragraph (2) as they think fit in consequence of any amendment, revocation or re-enactment of the regulations mentioned
45 in that sub-paragraph.'

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

Paragraph 9 states as follows:

50

‘(1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.

(2) In sub-paragraph (1) "special circumstances" does not include--
(a) ability to pay, or
(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to--
(a) staying a penalty, and
(b) agreeing a compromise in relation to proceedings for a penalty.’

17. 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
(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.’

18. 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--

(a) assess the penalty,

(b) notify P, and

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

19. 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--
>
> (a) affirm HMRC's decision, or
>
> (b) substitute for HMRC's decision another decision that HMRC had power to make.
>
> (3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 9--
>
> (a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or
>
> (b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 9 was flawed.
>
> (4) In sub-paragraph (3)(b) "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.
>
> (5) In this paragraph "tribunal" means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 14(1)).'

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

> '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.'

21. 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 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.

22. 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
>
> (2) For the purposes of sub-paragraph (1)--
>
> (a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control,
>
> (b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and
>
> (c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.'

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

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

> '(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]);
>
> (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]);
>
> (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]);
>
> (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]);

(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

25. HMRC's bundle of documents included copies of correspondence, computerised records of telephone attendance notes and HMRC notices, together with copies of materials and publications by which the new penalty system had been advertised.

26. As stated above, it was 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 was there any dispute between the parties as to the amount of PAYE and NIC required to be paid by the Appellant in each of the months in question. It was accepted by the Appellant that 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.

27. HMRC produced a penalty schedule for the hearing which took into account the decision in *Agar Ltd v Revenue & Customs* [2011] UKFTT 773 (TC) to the effect that the penalty for the 12th month is not included in the penalty notice, as the Appellant did not become liable to it until after the end of the tax year in question.

The Appellant's submissions

28. The Appellant did not attend and was not represented. The Tribunal therefore took into account the representations set out in its letter to HMRC on 17 October and the grounds of appeal in its Notice of Appeal.

HMRC's submissions

29. Ms. Weare for HMRC submitted that the Appellant had no reasonable excuse for the late payment of the PAYE. She submitted that under paragraph 11 of Schedule 56, HMRC had no discretion as to the imposition of the penalty. She said that the amount of the penalty was set down in paragraph 6 of Schedule 56 and if the taxpayer paid late, HMRC were obliged to impose the penalty.

30. Ms. Weare submitted that the initial warning letter stated that 'the penalty may be charged' because a penalty would not have been charged if the taxpayer had a reasonable excuse for the late payment or if special circumstances existed

31. Ms. Weare submitted that any lack of awareness of the penalty regime was not a special circumstance. She said that 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. 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
>
> .....please 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.'

32. Ms. Weare said that HMRC had to wait until the tax year ended to review the payments made and to see if there were months when the Appellant had a reasonable excuse and also to calculate what percentage rate should be used in respect of the defaults. There could have been reasons why a penalty was not chargeable, for example, if there was a time to pay arrangement in place.

Conclusion

33. At the end of the hearing the Tribunal gave its decision, for reasons which now follow.

34. The Appellant does not argue that it was experiencing financial difficulties over the period of default However for the avoidance of doubt, as 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 such event. Something specific, unforeseen and related to the particular taxpayer is required. Adverse economic conditions affecting business activity generally do not suffice.

35. HMRC are not under any statutory duty to warn the individual employers of a change in legislation and potential penalties. The legislation does not require HMRC to issue warnings. It is settled law that any failure by HMRC to give warning of the penalty regime cannot provide a reasonable excuse. The obligation is to make payment by the due date – see *Rodney Warren & Co* [2012] UKFTT 57 (TC) and *Dina Foods Limited* above.

36. The Tribunal is satisfied that there was an extensive campaign of advance publicity and that there was no reason why the Appellant should not have been sufficiently alerted. The Appellant's apparent lack of awareness of the new penalty regime is not capable of constituting a special circumstance or reasonable excuse.

37. The Appellant received the initial Penalty Default Warning letter in May 2010 (which also explained about time to pay arrangements) and subsequent enforcement warning letters. There also appears to have been a considerable amount of contact with HMRC throughout the year about late payments of PAYE. There were a number of telephone conversations with representatives of the company. A reasonably prudent employer, aware of its responsibilities to make timely payments of PAYE and NICs amounts, would have been prompted to make enquiries of HMRC to obtain information about the penalties that could be applied.

38. With regard to the issue of proportionality, In *Dina Foods*, at [40]-[42], the Tribunal considered whether the penalty was disproportionate, and said as follows:

> '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, the 4% penalty that was levied on the total of the relevant defaults in the tax year can be said to be disproportionate.
>
> 41. The issue of proportionality in this context is one of human rights, and whether, in accordance with the European Convention on Human Rights, Dina Foods Ltd could demonstrate that the imposition of the penalty is an unjustified interference with a possession. According to the settled law, in matters of taxation the State enjoys a wide margin of appreciation, and the European Court of Human Rights will respect the legislature's assessment in such matters unless it is devoid of reasonable foundation. Nevertheless, it has been recognised that not merely must the impairment of the individual's rights be no more than is necessary for the attainment of the public policy objective sought, but it must also not impose an excessive burden on the individual concerned. The test is whether the scheme is not merely harsh but plainly unfair so that, however effectively that unfairness may assist in achieving the social objective, it simply cannot be permitted.
>
> 42. Applying this test, whilst any penalty may be perceived as harsh, we do not consider that the levying of the penalty in this case was plainly unfair. It is in our view clear that the scheme of the legislation as a whole, which seeks to provide both an incentive for taxpayers to comply with their payment obligations, and the consequence of penalties should they fail to do so, cannot be described as wholly devoid of reasonable foundation. We have described earlier the graduated level of penalties depending on the number of defaults in a tax year, the fact that the first late payment is not counted as a default, the availability of a reasonable excuse defence and the ability to reduce a penalty in special circumstances. The taxpayer also has the right of an appeal to the Tribunal. Although the size of penalty that has rapidly accrued in the current case may seem harsh, the scheme of the legislation is in our view within the margin of appreciation afforded to the State in this respect. Accordingly we find that no Convention right has been infringed and the appeal cannot succeed on that basis'.

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

39. 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 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.

40. The Tribunal's jurisdiction on appeal against fixed penalties, as these are, was considered by the Upper Tribunal in *Hok Ltd*, where it was confirmed that the Tribunal's power is limited to correcting mistakes. It may decide that HMRC were wrong in deciding that a penalty was due and discharge it; or it may decide that HMRC imposed a penalty of the wrong amount, and replace it with the correct amount. However, the Tribunal does not have a power to substitute an amount other than the correct amount, whether on the basis of fairness or otherwise. Thus if HMRC have imposed a penalty in circumstances where one is due, and the penalty imposed is of the correct amount, there is nothing the Tribunal is permitted to do. No such power is granted by the statute and none arises under the general or common law.

41. 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 disproportionate and the administration of the penalty regime was not unfair to the Appellant. It therefore follows that the appeal must be dismissed and the penalties confirmed.

42. 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.

MICHAEL S CONNELL
TRIBUNAL JUDGE

RELEASE DATE: 23 May 2014