



TC02600

Appeal number: TC/2012/09904

INCOME TAX - Penalty - late payment of PAYE and NICs - FA 2009, Schedule 56 - whether an insufficiency of funds on the facts was a reasonable excuse for late payment - no - comments on HMRC guidance in relation to foreseeability - 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**

**PAUL ARTHURTON
TRADING AS PAUL ARTHURTON TRANSPORT**

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE GUY BRANNAN
HELEN MYERSCOUGH ACA**

Sitting in public at Norwich on 6 February 2013

The Appellant appeared in person

David Wilson, officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

- 5 1. This is an appeal against a penalty assessment (as amended) of £3,087.17, 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 respect of certain 11 months of the year ending 5 April 2011.
- 10 2. The dates and amounts of the PAYE payments due and made were not in dispute. The main issue in this appeal was whether the Appellant had a "reasonable excuse". The Appellant argued that the main reason for late payments was insufficiency of funds and that the insufficiency was attributable to events outside its control. The Appellant argued that HMRC's decision to impose penalties was
- 15 disproportionate.

Background and facts

3. With effect from 6 April 2010, a new penalty regime was introduced by Schedule 56 for late payment of monthly PAYE and NIC by employers. Previously, there was a mandatory electronic payment surcharge on large employers (those with
- 20 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 delay payments to HMRC without incurring any material penalty. But Parliament decided that this could not continue. Schedule 56 Finance Act 2009 changed the position by imposing penalties for late payment of PAYE. The
- 25 legislation, so far as material, is set out later in this decision.
4. 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
- 30 there are ten or more defaults during the tax year.

Number 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%

5. The penalty will not be levied if a) a time to pay agreement has 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, and that each payment was made as soon as the reasonable excuse ended.

6. We find the following facts.

7. The Appellant runs a road haulage business based in Norfolk.

5 8. The Appellant was late in paying its monthly PAYE and NICs to HMRC in every month of the 2010-11 tax year. The first default month is disregarded in accordance with the rules set out in Schedule 56 and following the decision in *Agar* any default in the twelfth month does not arise in the year 2010-11, but instead falls in the year 2011-12. Therefore, there were ten defaults for which penalties were payable.
10 HMRC produced a table showing the amounts of PAYE and NIC due for each of the relevant months, the due date for each month and the date that payment was made for each of the months in each of the months in which payment was 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	Payment Date	Penalty @ 4%
£2,025.15	19/05/10	03/06/10	disregarded
£6,693.06	19/06/10	26 /06/10	£267.72
£4,903.94	19/07/10	29/07/10	£196.16
£6,918.64	19/08/10	07/09/10	£276.75
£4,984.92	22/09/10	04/10/10	£199.40
£6,971.43	19/10/10	29/11/10	£278.86
£8,863.06	22/11/10	10/12/10	£354.52
£8,164.43	22/12/10	06/01/11	£326.58
£8,464.27	21/01/11	31/01/11	£338.57
£11,911.84	22/02/11	28/02/11	£476.47
£9,303.68	22/03/11	04/04/11	£372.52
£79,292.42			£3,087.17

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9. The Appellant did not dispute the figures and dates in this table.

10. HMRC assessed a penalty at 4% of the total amount of defaults and notified the Appellant of the penalty (revised from an earlier notification to take account of *Agar*) on 28 March 2012. The Appellant asked HMRC for an independent review. The
20 appellant supplied further information for the purposes of the review on 8 June 2012. By letter dated 15 June 2012 HMRC confirmed the decision. The Appellant appealed to the Tribunal on 30 October 2012.

11. Due to cash flow considerations during the default year the Appellant had made PAYE and NIC payments late. In the initial rounds of correspondence the Appellant put forward as the main reason for the late payment the fact that the Appellant's diesel fuel bills were regularly due on the 15th and 21st day of each month so that its cash flow on the due date for payment of PAYE and NIC (i.e. on or around the 19th of each month) was always problematic. The Appellant repeated this reason in his submissions at the hearing.

12. The Appellant's business was suffering because of the recession. He had had to make six members of staff redundant and had reduced his fleet from 14 to 8 vehicles.

13. Further difficulties arose in 2011, according to the Appellant, because the convergence of Good Friday, Easter Monday and the Royal Wedding (i.e. a public holiday on Friday and Monday). Effectively, people took a whole week off, which disrupted the flow of business and payments. As HMRC pointed out, the Royal wedding took place on 29 April 2011 and Easter Sunday was 24 April 2011 – both dates falling after the period is relevant to this appeal.

14. It had been announced that from January 2012, all commercial vehicles to have low emission engines in order to enter London (otherwise a £200 fee would be payable each time a vehicle ventured inside the M25). This required the replacement of the Appellant's fleet of vehicles. Approximately 50% of the Appellant's work was generated by loads going into and out of London. The new emission control regulations in respect of vehicles entering London had been introduced in 2008 and extended in January 2012. Vehicles could be fitted with filters, but, according to the Appellant, these filters cost between £5,000 and £7,000 each and the prices rose as the January 2012 deadline approached.

15. The Appellant, therefore, decided to replace his entire fleet of older vehicles with new vehicles that would meet the new emission control regulations. He sold his older vehicles in the North of England, where the emission control regulations relating to London were less important. The Appellant had hoped to steal a march on his competitors who did not replace their fleet with newer vehicles, but many of his competitors simply rented newer vehicles and therefore the additional expenditure incurred in replacing his fleet did not, in the event, benefit the Appellant competitively.

16. The Appellant had found it increasingly difficult to get its customers (particularly larger customers) to pay on time.

17. A number of its customers had become insolvent. Furthermore, one customer had changed the way they paid the Appellant's invoices, leaving approximately £6,000 unpaid.

18. It was not clear to which period(s) the difficulties with customers going into insolvency or the difficulty with the missed invoices related, save as set out in the following paragraph.

19. As regards insolvencies, although HMRC in correspondence had asked for details of insolvent customers, including details of monies due and the dates of the insolvencies, the Appellant had only supplied the names of four customers. As regards those four customers, two of them were limited companies. According to
5 HMRC's researches in the Companies Register, Armstrong Distribution Limited was wound up on 11 February 2009 i.e. before the periods material to this appeal. Logistics Limited went into administration on 2 July 2009 (i.e. before the periods material to this appeal) and were wound up on 1 June 2010 i.e. in the second month of the periods covered by this appeal. As regards the other two customers, Edwards
10 Road Haulage and KL Logistics, these businesses were not limited companies and therefore public records are not available. Regarding Edwards Road Haulage the appellant advised that the business was taken over by a new owner who stopped paying after 4 months, leaving a £4,500 debt. He did not provide specific dates.

20. Barclays Bank would not extend the Appellant's overdraft of £10,000.

15 21. The Appellant had to change his accountants after a fraudulent member of staff of the accountants had been convicted of theft. The Appellant had not been the victim of the theft but the Appellant's accounts for 2010/2011 and "well into 2012" had to be completely checked and verified. The replacement accountant hired by the Appellant to undertake this work resigned after six weeks. The work involved had taken much
20 longer than expected and had caused health issues for the appellant with stress.

22. Nonetheless, it was clear from the Appellant's evidence that the details of the fraud had come to light in January 2012. It did not affect the ability of the Appellant to make payments of PAYE and NICs in 2010/2011.

The legislation

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

24. 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."

30 25. Paragraphs 3 to 8 provide:

"(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.

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)."

26. 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.

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	<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

27. 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.

28. 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.

29. 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

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

(2) For the purposes of this paragraph, P makes a default when P fails to make one of the following payments (or to pay an amount

comprising two or more of those payments) in full on or before the date on which it becomes due and payable--

(a) a payment under PAYE regulations;

5 (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 default for that tax year.

10 (4) If P makes 1, 2 or 3 defaults during the tax year, the amount of the penalty is 1% of the amount of the tax comprised in the total of those defaults.

(5) If P makes 4, 5 or 6 defaults during the tax year, the amount of the penalty is 2% of the amount of the tax comprised in the total of those defaults.

15 (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.

20 (7) If P makes 10 or more defaults during the tax year, the amount of the penalty is 4% of the amount of the tax comprised in the total of those defaults.

(8) For the purposes of this paragraph--

(a) the amount of a tax comprised in a default is the amount of that tax comprised in the payment which P fails to make;

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

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

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

31. Paragraph 9 states as follows:

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

35 (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.

40 (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."

32. 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,

5 (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").

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--

(a) P breaks the agreement (see sub-paragraph (4)), and

15 (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--

20 (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.

25 (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."

33. Paragraph 11 requires that HMRC must levy a penalty where P is liable – the imposition of a penalty is mandatory. Paragraph 11 provides:

30 "(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."

35 34. 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 set out in paragraph 15, as follows:

40 "(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

5 (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.

(4) In sub-paragraph (3) (b) "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.

15 (5) In this paragraph "Tribunal" means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 14(1))."

35. As observed in *Dina Foods Limited*, [2011] UKFTT 709 (TC) at paragraph 15 the Tribunal is empowered :

20 "...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
25 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 36. Under paragraph 16 of Schedule 56, there is no liability for a penalty if the Tribunal is satisfied that there was a reasonable excuse. The burden of proof in respect of reasonable excuse is on the Appellant. 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
35 say: "the failure does not count as a default for the purposes of paragraph 6..." The effect of this change is to make it 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.

37. Paragraph 16 of Schedule 56 provides as follows:

40 (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)--

5 (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

10 (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.

38. In considering a reasonable excuse we must examine 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. This the test laid down by Lord Donaldson MR in *Customs and Excise Commissioners v Steptoe* [1992] STC 757 at 770:

20 "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."

39. Moreover, the Court of Appeal in *Steptoe* emphasised that it was necessary to look at the underlying cause of the insufficiency of funds in order to determine whether there was a reasonable excuse.

40. To this we would simply add that the insufficiency of funds will not be a reasonable excuse unless attributable to events outside the Appellant's control (paragraph 16 (2)(a)).

30 **Arguments of the parties**

41. In addition to the points made in paragraphs 11 – 22 above, the Appellant asked that the amount of the penalty should be reconsidered. It was much greater than the 3% interest rate on the overdue tax which the Appellant had asked HMRC to consider and which the Appellant considered appropriate. Essentially, the Appellant was arguing that the penalty was disproportionate.

42. Mr Wilson argued that none of the reasons for the late payment put forward by the Appellant constituted a reasonable excuse. In the bundle of papers for the hearing, Mr Wilson produced HMRC published guidance in relation to "reasonable excuse" in the context of PAYE/NICs which read as follows:

40 "What is reasonable will be different from person to person depending on their individual circumstances. However, it is normally something

exceptional that you could not have predicted and that is outside your control....

In addition, the law says that HMRC cannot usually accept is reasonable:

- 5 • Lack of money. HMRC cannot treat lack of funds is reasonable unless the shortages due to unforeseeable events outside your control. If you are having difficulty paying there's information in the next section 'What to do if you can't pay'."

10 43. As regards proportionality of the penalties, Mr Wilson noted that the penalties were set out in legislation. The first late payment of PAYE/NICs was ignored. The penalty regime in Schedule 56 took account of the number of defaults and the amount of tax involved. In addition, taxpayers had the potential defence of "reasonable excuse". Mr Wilson, therefore, submitted that the scheme of the penalty legislation in
15 Schedule 56 was proportionate and referred us to the decision of the Upper Tribunal in *Total Technology (Engineering) Ltd v Revenue and Customs Commissioners* [2012] UKUT 418 (TCC).

44. Mr Wilson also argued that the Appellant had not approached HMRC's Business Payment Support Service before each month's payments fell due in order to
20 negotiate a Time to Pay Agreement.

Discussion

45. As already noted, paragraph 16 (2) Schedule 56 provides that an insufficiency of funds is not a reasonable excuse unless attributable to events outside the Appellant's control. The burden of establishing a reasonable excuse for these purposes
25 falls on the Appellant.

46. A "reasonable excuse" must be determined objectively but taking into account the unique factual circumstances of the taxpayer in question. We have already set out approach adopted by the Court of Appeal in *Stepto*. In reaching our decision we have adopted the same approach, but bearing in mind the statutory requirement of
30 paragraph 16 (2) that any events relied on as constituting a reasonable excuse in the context of insufficiency of funds must be outside the Appellant's control.

47. In particular, we do not consider the statement in HMRC's guidance, that lack of funds is not a reasonable excuse "unless the shortages due to unforeseeable events outside your control", to be correct. It is true that the reference to events outside the
35 control the taxpayer correctly reflects the statutory test. It is also true that insufficiency of funds due to "unforeseeable" events will in most cases constitute a reasonable excuse, but drawing the boundary in such a way is misleading and inaccurate.

48. In our view, the guidance places too much emphasis on foreseeability as a factor
40 and wrongly implies that foreseeability of an event or circumstance will necessarily preclude a reasonable excuse. That is not so. The authorities make it plain that it is possible even for foreseeable events to provide the foundation for a "reasonable

excuse" in relation to insufficiency of funds. It is simply that it is more difficult for a taxpayer to show in relation to foreseeable events that the failure to pay on time could not reasonably have been avoided.

5 49. The relevance of foreseeability in the context of the reasonable excuse defence was considered in *Steptoe*. Lord Donaldson MR rejected the test adopted in the dissenting judgment of Scott LJ that the cause of the default had to be an 'unforeseeable or inescapable event'. Lord Donaldson MR said at 770:

10 " Scott LJ ...is of the opinion that the underlying cause of the insufficiency of funds must be an 'unforeseeable or inescapable event'. I have come to the conclusion that this is too narrow in that (a) it gives insufficient weight to the concept of reasonableness and (b) *it treats foreseeability as relevant in its own right, whereas I think that 'foreseeability' or as I would say 'reasonable foreseeability' is only relevant in the context of whether the cash flow problem was 'inescapable' or, as I would say, 'reasonably avoidable'. It is more difficult to escape from the unforeseeable than from the foreseeable.*"

15 (Emphasis added)

20 50. Moreover, Nolan LJ, explaining his earlier decision in *Customs and Excise Comrs v Salevon Ltd* [1989] STC 907, also disapproved the over-emphasis of "foreseeability" as a test in determining whether a taxpayer had a reasonable excuse. Nolan LJ said at 756:

25 " My references in *Salevon* to 'the wrongful act of another' and to the distinction between 'the trader who lacks the money to pay his tax by reason of culpable default and *the trader who lacks the money by reason of unforeseeable and inescapable misfortune*' were directed to the facts of that case. They cannot be regarded as an all-purpose test of what constitutes a reasonable excuse." (Emphasis added)

30 51. In addition, in a letter dated 28 March 2012 indicating that HMRC did not accept the Appellant's reasons for appealing against the penalties, HMRC stated that "legislation does not allow HM Revenue and Customs to take [cash flow difficulties] into consideration when raising penalties." The same point was made in a letter of 15 June 2012 from HMRC notifying the Appellant of the outcome of HMRC's independent internal review. This seemed to us to be a misinterpretation of the

35 legislation. It is the underlying cause of the cash flow difficulties which may have resulted in the inability to pay which is relevant. The underlying cause may or may not constitute a reasonable excuse. It is simply too broad (and misleading) to state that cash flow difficulties cannot be taken into consideration. Hopefully this will be drawn to the attention of HMRC officers conducting reviews in penalty cases.

40 52. Applying the test referred to in paragraphs 38-40 above, we have come to the conclusion that the Appellant did not have a reasonable excuse for the late payment of PAYE/NICs in the periods under appeal.

53. Initially, the Appellant in correspondence with HMRC had put forward the main reason for the late payments as being the timing of diesel fuel payments which fell due on the 15th and 21st day of each month making it, as the Appellant commented, "problematic" to pay PAYE/NICs, which were due to be paid to HMRC on or around the 19th day of each month. It seems to us that the reasonable businessman, who took proper account of his obligations to pay tax, would have anticipated the need to pay out significant sums at this time of each month. What was required was additional working capital for the business. There was nothing unusual about the fuel payments or about the tax payments. It cannot be right that the Exchequer should be placed in the position of the provider of last resort of the Appellant's working capital.

54. As already discussed, we do not consider that the fraud took place within the business of the Appellant's accountants prevented the Appellant from making timely tax payments in the year 2010/2011. The fraud was not discovered until after the end of the year under appeal and no money was stolen from the Appellant.

55. The Royal Wedding and Easter public holidays in 2011 took place after the payments were due in respect of the periods under appeal. They cannot have contributed to the late payments by the Appellant.

56. In our view, the Appellant failed to show that the insolvencies of some customers caused, either alone or in combination with other events, the late payments for the periods in question. We have indicated above that two of the four customers (i.e. the limited companies) which became insolvent did not do so during the periods under appeal. There was no evidence indicating when the other two customers became insolvent. We, therefore, could not accept that the Appellant had established that the insolvencies of these two other customers had caused the insufficiency of funds for the periods in question.

57. In relation to the issue of emission controls the vehicles entering London, these new regulations were introduced in 2008 and were extended in January 2012. HMRC argued that the Appellant had adequate time to adapt to these new regulations. We accepted, however, the Appellant's evidence that fitting new filters to his existing vehicles would have been an economic. But the Appellant failed to demonstrate that the replacement of his existing vehicles had produced the cash flow problems that resulted in the late payments in 2010/2011.

58. As regards proportionality, we do not regard the penalty regime contained in Schedule 56 to be disproportionate as a whole or in its application to the particular circumstances of the Appellant. First, a default in the first month is ignored. The percentage penalties increase by reference to the number of defaults in the year and are geared to the amount of tax which is paid late. A taxpayer does not incur a penalty if a reasonable excuse for the default can be demonstrated. In addition, HMRC have a discretion in paragraph 9 Schedule 56 to reduce the penalty to take account of "special circumstances." We do not, therefore, consider the scheme of penalties in Schedule 56 to be disproportionate nor do we consider that it is disproportionate in its application to the Appellant. In reaching this decision we have borne in mind the principles set out by the Upper Tribunal in *Total Technology*

(Engineering) Ltd v Revenue and Customs Commissioners [2012] UKUT 418 (TCC) (Warren J and Judge Bishopp).

59. Finally, we should note that HMRC have a discretion to reduce the penalty where "special circumstances" exist (paragraph 9 Schedule 56). This discretion belongs to HMRC and the tribunal can only take account of "special circumstances" to a different extent from HMRC if HMRC's decision in respect of "special circumstances" is flawed in the judicial review sense (paragraph 15 Schedule 56). There was no indication in the papers before us or in Mr Wilson's submissions that HMRC had, at any stage (and certainly not before the notice imposing penalties on the Appellant was issued), considered whether their discretion should be exercised. In our view, this represented a flaw in HMRC's decision which allows us to substitute our judgment on the question whether "special circumstances" existed which justified a reduction in the penalties imposed on the Appellant.

60. As explained in *White v Revenue & Customs* [2012] UKFTT 364 (TC), "special circumstances" means "something out of the ordinary, something uncommon" (*Clarks of Hove Ltd. v Bakers' Union* [1978] 1 W.L.R. 1207). In addition, the failure by HMRC to consider whether to exercise a discretion conferred by statute, results in a flawed decision (see *White*, above, *Hardy v Revenue & Customs* [2011] UKFTT 592 (TC), *Rodney Warren & Co v Revenue & Customs* [2012] UKFTT 57 (TC) and *Roche v Revenue & Customs*[2012] UKFTT 333 (TC)). For this reason we consider that we are entitled to consider whether there are any "special circumstances" which justify a reduction in the penalties imposed on the Appellant.

61. In reviewing the facts of this case, however, it did not seem to us that the reasons, insofar as they had been established, for the Appellant's failure to pay his tax liabilities on time amounted to "special circumstances". For this reason, we did not think it appropriate to reduce the penalties under appeal.

Decision

62. For the reasons given above, we dismiss this appeal.

Rights of appeal

63. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**GUY BRANNAN
TRIBUNAL JUDGE**

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RELEASE DATE: 13 March 2013