



**TC03409**

**Appeal number: TC/2013/04451**

*INCOME TAX – PAYE - penalty for late payment – Schedule 56 FA 2009 – illness of directors – allocation of payments - HMRC guidance in Debt Management and Banking Manual DMBM210105 that exceptionally HMRC should suggest different allocation of payment to taxpayer where in taxpayer’s best interests considered – no reasonable excuse – no special circumstances – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**BILAMAN MANAGEMENT SERVICES LLP**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE SWAMI RAGHAVAN  
MRS SHAMEEM AKHTAR**

**Sitting in public at 45 Bedford Square, London on 14 January 2014**

**The Appellant did not attend and was not represented**

**Mrs Bentley and Mrs Gardner, Officers of HM Revenue and Customs, for the Respondents**

## DECISION

### *Introduction*

5 1. The appellant appeals against a penalty notice issued on 10 January 2013 for late payment of PAYE and National Insurance Contributions during the year 2011-12. The appellant argues it has a reasonable excuse for late payment due to the illness of key members of its staff. It also argues that if HMRC had followed its own guidance and had allocated payments in the appellant's best interests, there would only have  
10 been two defaults, and the penalty would be reduced.

2. HMRC say the recovery from ill health of the director who was responsible for payroll administration began in 2010. The director was not incapacitated to the extent he could no longer perform his duties, and if he was not able to deal with payment processing, steps should have been put in place by the appellant LLP to ensure the  
15 payments were paid on time.

### *Proceeding in absence of the appellant*

3. The appellant did not attend at the time listed or contact the Tribunal in relation to its non-attendance. Notices of hearing were sent to both the appellant and its representative Barnes Roffe chartered accountants LLP on 15 October 2013. On the  
20 afternoon of the hearing the Tribunal's clerk contacted Andrew Barnes of Barnes Roffe. After several conversations between the clerk and Mr Barnes the clerk was told that Mr Barnes had spoken to the wife of Mr Shen Yap, the person at Barnes Roffe dealing with the appeal and been told by her that Mr Yap was ill. The clerk was told  
25 by Mr Barnes that the appellant was happy for the hearing to go ahead in the absence of the appellant. HMRC were in attendance and supported the hearing going ahead. The documents we had before us contained the appellant's Notice of Appeal and various items of correspondence between the appellant and HMRC. Taking account of the appellant's indication that it was content for the hearing to go ahead and the fact that the Notice of Appeal and the appellant's correspondence set out the appellant's  
30 various arguments we determined that it was in the interests of justice to proceed in the appellant's absence.

### *Background Facts*

4. The appellant is part of a group of companies. It inherited its employees under TUPE provisions during tax year 2011-12 from Bilaman Limited, and also took over  
35 that company's PAYE reference. Bilaman Limited was formed in 1989. Its core business was the provision of management services to related companies but it subsequently diversified into other activities including making investments in property related interests. One of the main reasons for Bilaman Limited's existence and now the existence of the appellant LLP is to safeguard the confidentiality of the  
40 payroll of senior management.

5. The Group Finance Director is Mr Alan Benton. He is retained as the sole responsible officer with any authority to process and administer the payroll of the appellant.

6. Mr Benton was ill during 2009 and into 2010. In that period he had multiple treatments for bowel cancer and a heart condition. He needed to visit the hospital regularly for treatments and was intermittently absent from work during and after operations and treatments. He was in a critical condition around mid-2009 and began his recovery from 2010. When Mr Benton was absent, Barnes Roffe were appointed by the managing director, Mr Laurence Payne, to provide temporary cover which included acting as temporary payroll administrators. They worked with Mr Laurence Payne and Mr T Payne to deal with certain matters which required management approval. Barnes Roffe did not accept the responsibility for payment processing as they were the group's auditors. The responsibility of payment processing remained with Mr Benton.

7. Mr L Payne began feeling ill from around mid 2011. He developed symptoms of illness which required numerous unexpected hospital visits, treatments and check ups. Mr L Payne suffered a mini-stroke and the discovery of a tumour. The tests and treatment continued into late 2012 when he recovered. Mr T Payne did not take over Mr L Payne's duties.

8. The appellant does not dispute the amounts that were paid and the dates those amounts were paid. However we note that the date of payments set out in the appellant's letter of 6 March 2013 (which reflect manuscript dates written onto the PAYE late payment penalty calculation document in HMRC's penalty notice of 10 January 2013) are (with one exception where the date is the same) later than the dates HMRC suggest the payments were made.

9. HMRC took us to the computer records supporting the payment dates. It seems to us that the payments dates which are reflected in HMRC's computer records are more likely to be correct than later dates in the appellant's letter for which there is no supporting evidence. Despite the preferred HMRC computer record payment dates being earlier than the appellant's payment dates this did not affect the outcome that there were a number of payments which were made late. Under the Income Tax (PAYE) Regulations 2003 ("the PAYE Regulations") payments were due on the 19<sup>th</sup> of each month for payments which were not made by electronic communication. The appellant made its payments by cheque.

10. The table below sets out details of the late payments.

40

<b>Tax period ending</b>	<b>Date amount paid</b>	<b>Failure to pay counts towards default penalty</b>	<b>Number of days late where applicable</b>
5 May 2011	30 June 2011	No	42
4 June 2011	12 July 2011	Yes	23
5 July 2011	23 July 2011	Yes	4
5 August 2011	27 August 2011	Yes	8
5 September 2011	29 September 2011	Yes	10
5 October 2011	19 October 2011	No [not applicable]	
5 November 2011	23 November 2011	Yes	4
5 December 2011	7 January 2012	Yes	19
5 January 2012	31 January (cheque dishonoured) 21 February 2012	Yes	12  33
5 February 2012	29 February	Yes	10

	2012		
5 March 2012	31 March 2012	Yes	9

11. The penalty was calculated on the basis that there had been 9 defaults which counted towards the penalty. Under paragraph 6 Schedule 56 Finance Act 2009, the default penalty was 3% of the total amount of tax comprised in those defaults. Although the number of defaults is disputed, the calculation of the penalty amount on the basis that there had been the 9 defaults in respect of the periods identified above was not in issue.

12. As noted at [4], one of the main reasons the appellant was set up as a separate entity was to protect the confidentiality of the payroll of its senior management. In view of that fact and taking into account that the amounts paid and the calculation of the penalty were not in issue we have not recorded the details of the tax amounts and penalty in this decision.

13. Each of the payments made by the appellant was made by cheque. They were accompanied by a payslip completed by the appellant which specified the “period ending” as set out in the column headed “tax period ending” in the table above (eg the amount paid on 30 June 2011 specified the “period ending” 5 May 2011).

14. As discussed further below one of the appellant’s arguments is that the amounts which were paid should have been allocated to different periods and that if this had happened there would only have been two defaults.

15. HMRC notified the penalty to the appellant in a letter dated 10 January 2013.

*Law*

16. 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).”

17. The Table lists numerous various categories of taxes. Item 2 refers to Income tax and the amount of tax payable under the PAYE Regulations. It specifies the date after which the penalty is incurred as being the date by which the amount must be paid under the PAYE Regulations. Under Regulation 69 of those Regulations, payments are due within 14 days after the end of the tax period where payments are not made electronically.

18. Regulation 67A of the Social Security Contributions Regulations (SI 2001/1004 as amended) applies the late payment penalty regime set out in Schedule 56 to late payment of Class 1 NIC contributions.

19. 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;

(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.

(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.

(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.

(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;
- (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.

5 ...

20. Paragraph 11 states that HMRC must assess and notify a penalty where P is liable for a penalty:

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

- 10 (a) assess the penalty,
- (b) notify P, and
- (c) state in the notice the period in respect of which the penalty is assessed.”

15 21. Under paragraph 16 of Schedule 56, liability for a penalty in relation to a failure to make a payment does not arise if there is a reasonable excuse for the failure.

22. The version of paragraph 16 of Schedule 56 which applied at the relevant time provided:

“Reasonable excuse

20 (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 the failure, and

25 b) the failure does not count as a default

(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,

30 (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.”

35 23. Where amounts due remain unpaid after 6 months and 12 months liabilities for further penalties arise. There are no such penalties in issue in this appeal.

24. Paragraph 9 of Schedule 56 deals with special reduction of the penalty. It provides as follows:

“Special reduction

5 15 (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

10 (b) the fact that a potential loss of revenue from one taxpayer is

20 balanced by a potential over-payment by another.

....”

25. 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:

“(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--

20 (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--

25 (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.

30 (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)).”

#### *The appellant's arguments*

35 26. The appellant argues it has a reasonable excuse due to the illness of key members of its staff. It argues that Mr Benton's and Mr L Payne's respective illnesses caused administrative issues (including the late payments under consideration) but that they were not incapacitated to the extent they could no longer perform their duties. It would have been wholly impractical to relieve either of them of their duties.

Due to the confidentiality of the executive payroll it was not practical to involve other staff.

27. The appellant also argues the penalty is excessive because HMRC should have allocated the payments the appellant made differently.

5 28. Essentially the suggested allocation was that the payment made on 12 July  
2011 (18 July 2011 according to the appellant) ought to have been allocated to the  
upcoming month 3 in the tax year (July 2011) rather than to month 2 (June 2011), and  
that the amount for month 2 (June 2011) ought to have been left outstanding until paid  
by the payment made on 31 March 2012 (4 April 2012 according to the appellant).  
10 Allocating along these lines would have resulted in only two late payments (for month  
1 and month 2). HMRC should have overridden the appellant's instructions regarding  
allocation of payment given HMRC's own instructions in their Debt Management and  
Banking Manual where at paragraph DMBM210105 it is stated:

15 "Where exceptionally you feel the customer's allocation would not be  
in their best interests, for example because a different debt is about to  
be enforced, you can suggest to the customer that it would be in their  
best interests to allocate differently."

#### *HMRC's arguments*

20 29. HMRC say none of the appellant's arguments amount to a reasonable excuse.  
Mr Benton continued to perform duties and was, on the appellant's account,  
responsible for making the payments. Mr L Payne's illness would not therefore have a  
bearing on the late payments. If Mr Benton was not able to perform the payment  
duties then steps ought to have put in place to ensure the payments were made on  
time.

25 30. In relation to the point on allocation HMRC highlight that the payments were  
allocated by the appellant. The exceptional circumstances contemplated by the extract  
from the manual do not cover monthly payments under the PAYE regulations.

#### **Discussion**

30 31. We are satisfied from the schedule HMRC took us to, and the underlying  
excerpts from computer records that the payments of PAYE were made late. We are  
also satisfied that a valid penalty notice for late payment of PAYE was issued and  
served on the appellant.

32. The main issue in this appeal is whether the appellant had a reasonable excuse  
for any of the late payments due to:

- 35 (1) The illness of its directors.  
(2) An expectation that HMRC ought to have allocated the payments the  
appellant made in a way which was more beneficial.

(3) An assurance the appellant says was given by HMRC to a director that penalties would not be charged if payments were made before the due date for the next month.

*Reasonable excuse*

5 33. The legislation does not define a reasonable excuse. Whether someone has a reasonable excuse depends on the particular circumstances of the case.

*Illnesses of Mr Benton and Mr L Payne*

10 34. During 2011-12 Mr Benton was less able to perform his duties because of the illness from which he recovered in 2010. Mr L Payne suffered ill health in this period but was not incapacitated to the extent he could no longer perform his duties.

15 35. Both directors, on the appellant's account, were performing their duties. There is no evidence before us which suggests the state of their health meant that despite performing their duties they were not able to make PAYE payments on time. Whatever the nature of those duties was it seems improbable to us that the directors were able to perform them and to see that PAYE payments were made, despite suffering from ill health, but not see to the PAYE payments being made by the required deadline. The appellant does not therefore have a reasonable excuse on the grounds of the directors' ill health whether the circumstances of Mr Benton or Mr L  
20 Payne are viewed individually or collectively.

25 36. In any case in considering whether an appellant has a reasonable excuse we consider it is relevant to look at whether the steps the taxpayer has taken to comply with its obligations are ones that are reasonable in the circumstances. Even if we accepted the directors were able to perform their duties but were nevertheless not able to make PAYE payments on time, we would have expected that an LLP in such circumstances could reasonably have been expected to take steps to engage someone else with a view to making sure the obligations to make payments on time were complied with.

30 37. Further, we do not accept the appellant's argument that confidentiality around the payroll explains why alternative help was not sought. It is standard for terms of business to involve confidentiality provisions and it would be a straightforward matter to ensure the terms of engagement with the payroll provider protected confidentiality to a sufficient degree. In any case the fact that Barnes Roffe were appointed as temporary payroll administrators indicates the LLP thought it was possible to engage  
35 outside assistance. An LLP in the position of having two directors with ill health issues which meant they had difficulties paying on time but who were not incapacitated from their other duties would if acting reasonably have taken steps to make sure that the payments were made on time. There is no evidence of what attempts the appellant made to address any difficulty Mr Benton had paying PAYE on  
40 time through getting the task to be carried out by someone else.

*Argument that HMRC should have allocated payments differently*

38. Through specifying the period to which their cheque related, the appellants accept that they made an allocation. The appellant is not seeking to reallocate the payments made after the event. The issue is whether, despite that, HMRC ought in accordance with their own instructions (DMBM210105) to have made a different allocation. In support of their position the appellant refers to the First-tier Tribunal decision in *Kelcey & Hall Solicitors v HMRC* [2012] UKFTT 662(TC).

39. HMRC say the statement in DMBM210105 (set out at [28] above) refers to an exceptional circumstance, not to a regular monthly payment that is governed by the PAYE Regulations.

40. In relation to the decision in *Kelcey & Hall Solicitors* HMRC point to the fact that in that case the appellant did not exercise their right to choose the allocation at the time of payment and the Tribunal thought that HMRC could have chosen better.

41. The appellant does not explain on what basis its argument on allocation would assist it in terms of the relevant legislation. However, although not articulated as such by the appellant, we will consider whether HMRC's omission to reallocate provides the basis for a reasonable excuse. (We also consider at [66] below whether any omission would constitute special circumstances which warranted a special reduction in the penalty. )

*The FTT's decision in Kelcey & Hall Solicitors*

42. The appellant refers to the above decision in support of their argument. As a decision of the First-tier Tribunal the decision is not binding but may be of persuasive value. The appellant in that case had missed the payment for month 1 and then paid ahead of the deadline for subsequent months. The payment for month 2 was allocated to month 1, month 3 was allocated to month 2 which meant each payment was subsequently one month late. The Tribunal found that this was a case where exceptionally "the customer's allocation was not in their best interests and [HMRC] ought to have suggested that he allocate differently". The Tribunal decided that:

"...certainly by time of the monthly conversation with the HMRC staff relating to the late payment in respect of month 5 either the HMRC staff ought to have known that the new regime was being immediately enforced or they ought to have suggested in accordance with DMBM210105 that he allocated differently."

43. The Tribunal found that there were special circumstances and reduced the penalty in respect of month 5 onwards.

44. In its letter of review of 3 June 2013 HMRC depict *Kelcey* as a case where the appellant did not exercise its right to choose the allocation at the time of payment. It was thought by the Tribunal that HMRC could have chosen better for them.

45. The issue of who made the allocation was not addressed explicitly but having considered the decision it is not clear to us that it is correct to say that the case was

one where the appellant did not choose an allocation at the time of payment. Rather the findings indicate to us that the appellant in that case had made an allocation which resulted in payments being a month late. It was only at a later point when the appellant realised the implications that he made a different allocation. (See [13], [15], [18], [34] and [36] of the decision). *Kelcey* cannot therefore be distinguished from the present case on the basis HMRC suggest.

46. HMRC further suggest the facts of *Kelcey* are distinguishable from the present case because there month 1 was missed, whereas in this case while month 1 was not paid on time it was not missed. However it is not clear to us that month 1 was missed by the appellant in *Kelcey* as opposed to being late. The difficulties the appellant complained of there arose precisely because month 1 was paid rather than being left outstanding (See [13] and [17]).

47. We were referred by HMRC to *Chieftain Trailers v HMRC* [2012] UKFTT 132 (TC) where Judge Blewitt stated the following:

15                    “The payments made by the Appellant related to a specific month’s liability, which was confirmed by the payslip. I found as a fact that there is no obligation on HMRC, of its own volition and without the consent of the taxpayer, to deliberately ignore such allocation; indeed had it done so, serious concerns would no doubt be raised.”

20 48. There, as in this case, it was clear allocation had been made by the appellant, but the allocation did not work to the appellant’s advantage in the calculation of the penalty. The relevance or otherwise of the HMRC manual statement at DMBM210105 was not however specifically put before the Tribunal for consideration.

25 49. HMRC also referred to *AJM Mansell v HMRC* [2012] UKFTT 602 (TC) and the Tribunal’s response to the appellant’s argument that it was unfair that HMRC did not reallocate. That was a case where the Tribunal set out the relevant common law in relation to allocations. It found as a fact that the appellant had made an allocation.

30                    “On the basis of our analysis above, it was the company which allocated the payments to the previous month. HMRC has no power to reallocate, see *The Mecca* above. HMRC are therefore simply unable, under the common law, to act in the way Mr Patel and Pinsent Masons are suggesting they should have acted.”

35 50. We note that the Tribunal in *Kelcey* did not have the benefit of the legal analysis set out in *AJM Mansell*. That analysis suggests that once the appellant has made an allocation it is not open for HMRC to reallocate it. However from the case law quoted the appellant can make the allocation right up until the time payment is made. To the extent there is an intervening period of time between HMRC receiving a cheque and accepting it as payment, there would therefore be an opportunity for HMRC to consider whether it was in the appellant’s best interests and reallocate. The legal mechanics of whether such reallocation could take place without involving the appellant are unclear and we were not addressed on the point but what is clear is that a reallocation could not be done after payment was made.

51. The approach taken in the *Kelcey* decision suggests HMRC ought to have gone through a process of reallocation. The Tribunal could not have meant reallocation after payment given that, as explained in *AJM Mansell*, that would not have been legally possible. But, the decision in *Kelcey* could be read as suggesting that reallocation before payment should have been carried out. We note that the discussion on the issue of allocation in *Kelcey* was in relation to the question of whether there were special circumstances which would allow for a special reduction in the penalty. The issue of whether an expectation that HMRC would act in accordance with its manual to reallocate could form the basis for a reasonable excuse was not considered.

52. On the face of it the terms of HMRC's manual (set out at [28] above) leave open the possibility that HMRC could override the appellant's allocation. While an example is given in the manual of such an exceptional circumstance it is an example and is not exhaustive of all the situations when HMRC would override the customer's allocation. Although HMRC say monthly payments under PAYE cannot be taken to fall within an exceptional circumstance such payments are not excluded. On the face of it there is no reason why monthly payments of PAYE could not be capable of falling within a fact pattern which amounted to an exceptional situation. The analysis in *AJM Mansell* suggests it is not possible legally to allocate differently once the payment is made, but as discussed above reallocation before payment may be possible.

53. However even if the appellant's complaint is to be reframed as being that HMRC did not reallocate sums before accepting payment (rather than the legally impossible reallocation after payment) we cannot see that HMRC, upon receiving the cheque in circumstances where PAYE was late, and faced with the appellant's allocation, would know that a better allocation would be achieved by allocating it to the next month.

54. Overriding the appellant's allocation and allocating to a future period for which PAYE was not yet due because this was in the best interests of the employer (from the point of view of reducing or avoiding liability to penalties) would entail HMRC having to make an assumption that the employer would not be complying with its obligation to pay PAYE on time. There is no reason in our view why HMRC should be expected to make that kind of assumption.

55. Further there is a risk that making such assumptions could result in HMRC putting the appellant in a worse position. If the employer has already incurred a level of defaults which gave rise to a penalty, and the issue is whether by allocating differently the penalty amount could be reduced, in choosing to override the appellant's allocation for the month due, HMRC would be increasing the length of time that PAYE was overdue. The longer the PAYE for that month is not paid, the greater the risk that further penalties may be incurred for late payment and the greater the late payment interest incurred. There is no reason to expect HMRC to take action which could potentially put the employer in a worse position depending on when the employer will pay the month that is left overdue (a matter which the employer is in a much better position to know in any case.)

56. In any case we do not consider that an instruction by HMRC to suggest exceptionally to the employer that it should reallocate would extend to situations which effectively entail HMRC sanctioning non-compliance with a payment obligation in order to avoid or reduce penalties.

5 57. This view is consistent with the Tribunal's views in *Chieftain* and *AJ Mansell*.

58. Accordingly in relation to the failures where the appellant says the late payment arose because HMRC did not allocate the previous month's payment to that month (in advance of the due date) we do think that an employer such as the appellant who specified that allocation could reasonably expect that HMRC would go against that allocation and reallocate the payment. Even if on its terms a statement in an HMRC manual suggests that reallocation would be possible exceptionally we do not think an employer in the appellant's circumstances could reasonably think its situation was exceptional and would fall under that treatment. Given the employer is better placed than HMRC to know what it is able to pay and when and therefore what allocation is likely to be in its best interests, in situations where an employer seeks to rely on HMRC overriding the employer's own allocation the question would need to be asked, why the employer would not specify an allocation which was in its own best interests in the first place?

59. The appellant's complaint that HMRC should have overridden the appellant's payment allocation does not give rise to a reasonable excuse for the failures to pay on time.

*Assurance given to Mr Benton that as long as the month's liability was paid before the following month was due then no penalties would become due?*

60. In a letter from Barnes Roffe to HMRC dated 29 May 2013 (in response to HMRC's letter of 25 April 2013 asking for further information) Barnes Roffe state:

30 " we have since also been informed by Mr Benton that during his period of illness, there were occasions when reminders would be received for the late payments. These reminders included telephone calls from HMRC during which an ill or recovering Mr Benton was assured that "as long as the month's liability was paid before the following month's was due, then no penalties would become due"

61. Our view is that the evidential weight of this statement is low given its secondary nature and given the lack of any supporting evidence.

62. We were taken through HMRC's summary of their contact with the appellant in 2011-12 and the notes of telephone calls (the "action history") upon which that summary was based. In relation to the invitation in Barnes Roffe's letter to check recordings of the telephone calls HMRC explained that telephone records are only kept by their contact centre. There is no indication in the action history of an assurance being given as to no penalties becoming due. There is a note on 21 June 2011 which indicates a director at the LLP was warned of PAYE penalties.

63. The burden of proof is on the appellant to establish the facts supporting a defence of reasonable excuse and we are not satisfied the appellant has discharged this burden in relation to showing that an assurance in the terms it suggests was given. (Although not submitted by the appellant, any argument that exchanges between the appellant and HMRC meant that there was a time to pay agreement would also fail. The appellant has not discharged the burden which lies with it to show there was such an agreement.)

*Special reduction*

64. The grounds on which the Tribunal may reduce a penalty under paragraph 9 of Schedule 56 FA 2009 are limited to situations where HMRC's decision is flawed. This includes situations where, as is the case here, there has been no consideration of special circumstances in HMRC's review which is the subject of this appeal (See [116] of *Robert Morgan and Keith Donaldson v HMRC* [2013] UKFTT 317 (TC)). Accordingly we consider whether there were special circumstances which warrant a special reduction here.

65. For the reasons set out [54] to [56] any argument that HMRC ought to have reallocated payments in the way the appellant suggests is misconceived. The appellant made its allocation when making the payment and its defaults arose accordingly. There are no special circumstances for a reduction in the penalty on this basis. We acknowledge this conclusion is different from the one the Tribunal in *Kelcey* reached. As noted above, that Tribunal did not have the benefit of the legal analysis in *AJM Mansell*. It is not clear that the Tribunal in *Kelcey* appreciated the impossibility of reallocating payments once they had been paid. In relation to the implications of expecting HMRC to override the appellant's allocation before payment was made the Tribunal's finding at [35] indicates that there was communication between HMRC and the appellant in that case from month 5 onwards which may have enabled HMRC to be in a better position to know what was in the appellant's best interests. There is nothing in the action history to which we were referred to indicate HMRC were equipped with sufficient knowledge of the appellant's proposed payments to know what would be an allocation which was in the appellant's best interests.

66. In relation to the argument that an assurance was given by HMRC that penalties would not be incurred, this cannot amount to special circumstances as it has not been established that an assurance was in fact given in the terms suggested.

67. The situation where both directors fell seriously ill was unfortunate but during the relevant period (2011-12) both directors were able to continue performing duties. The appellant's concerns about confidentiality did not provide a reasonable basis for not seeking help if it was required. Payments of PAYE continued to be made albeit late apart from on one occasion. The illness of Mr Benton, and Mr L Payne considered individually and collectively do not in our view amount to special circumstances which would enable a reduction in the penalty.

*Complaint about way HMRC handled decision*

68. The appellant argues that HMRC have not undertaken a thorough and fair review of its appeal as HMRC reached an initial decision without waiting to hear the hear the full background and that this is contrary to HMRC's requirement to treat the taxpayer fairly. This relates to HMRC's conduct after the issue of the penalty under appeal. It is not a matter which is relevant to whether the penalty was correctly imposed and in particular whether the appellant has a reasonable excuse for its PAYE payment defaults. HMRC have since accepted that they should not have responded to the appellant's initial appeal of 7 February 2013 without waiting for the additional information referred to in that letter and apologised to the appellant for this error in their letter of 3 June 2013. HMRC's handling does not in our view give rise to any special circumstances that would enable a reduction in the penalty.

**Decision**

69. HMRC's penalty decision in the amount stated in the penalty notice of 10 January 2013 is affirmed. The appellant's appeal is dismissed.

70. 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.

**SWAMI RAGHAVAN  
TRIBUNAL JUDGE**

**RELEASE DATE: 19 March 2014**