



TC04013

Appeal number: TC/2014/01698

Penalty – late payment of PAYE and NICs – FA 2009, Schedule 56 – whether an insufficiency of funds was a reasonable excuse for late payment – no – whether 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**

STELLA ROSA (CONTRACTORS) LTD

Appellant

- and -

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

**TRIBUNAL: JUDGE MICHAEL S CONNELL
DR HEIDI POON**

Sitting in public at 45 Bedford Square, London on 28 July 2014

The Appellant did not attend and was not represented

Ms Hellie Lai, Officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

- 5 1. This is an appeal against a penalty assessment (as amended) of £6,519.96 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 2013.
2. The dates and amounts of the PAYE payments due and made are not in dispute.
- 10 The appeal is based on whether the Appellant has a “reasonable excuse”.

Background

3. The Appellant is a construction company based in London. The company was incorporated and joined the PAYE scheme in 2008.
4. From 6 April 2010 under Schedule 56 Finance Act 2009 a new penalty regime
15 was introduced for late payment of monthly PAYE and NIC by employers. The legislation in relevant part is set out below.
5. The penalty under Schedule 56 is 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
20 penalty of 1%, 2%, 3% or 4% depending on the cumulative total of defaults in a tax year. A 4% penalty is payable if there are ten or more defaults during the tax year.

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

6. The penalty will not be levied: (a) if 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
25 reasonable excuse for each or any default.

7. The Appellant was late in paying its monthly PAYE and NICs to HMRC every month in the 2012-13 tax year. The first failure does not count as a default by virtue of the legislative provisions under paragraph 6(3) of Schedule 56. Furthermore, following the decision in *Agar v HMRC* [2011] UKFTT 733 (TC), any default in
30 month 12 does not crystallize in that tax year, but instead falls in the following year. Therefore there were a total of 10 defaults for 2012-13 even though there had been 12 late payments of PAYE and NICs. 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 the number of days that the payment was late in each of the 10 months which counted towards a default for purposes of penalty determination.

5 8. HMRC assessed a penalty at 4% based on the total number of defaults and notified it to the Appellant in a letter dated 17 January 2014. The Appellant appealed the decision on 2 February 2014. HMRC looked at the decision again and by letter dated 12 February 2014 said it was unable to accept the Appellant's grounds of appeal. The reasons given by HMRC were that:

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

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

20 (iii). The amount of penalty charged is relative to the amount of payments made after the due date. The Appellant was late every month for the tax year 2012-13 resulting in a penalty calculated at 4%.

9. HMRC advised the Appellant that if it wished to appeal to HM Courts and Tribunal Service, its appeal had to be submitted by 14 March 2014.

25 10. The Appellant appealed to the Tribunal on 26 March 2014 (its Notice of Appeal being dated 26 February 2014).

The legislation and relevant authorities

30 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.

35 (2) Paragraphs 3 to 8 set out—

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

40 (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.

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(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.

	<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

10 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.

15 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:

20 (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 subparagraphs (2) and (3)), and

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

30 (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.
- (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.

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

16. 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.
- (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--

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- (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:

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- (1) This paragraph applies if--
 - (a) P fails to pay an amount of tax when it becomes due and payable,
 - 15 (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").
 - 20 (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.
 - 25 (3) But if--
 - (a) P breaks the agreement (see sub-paragraph (4)), and
 - 30 (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.
 - 35 (4) P breaks an agreement if--
 - (a) P fails to pay the amount of tax in question when the deferral period ends, or
 - 40 (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.
 - 45 (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
- 5 (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.

15 (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.

20 (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
- 25 (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.

30 (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:

35 '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

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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:

- 15 (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...
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- (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,
- 25 (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.
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23. In considering whether a reasonable excuse existed, the Tribunal examines the actions of the Appellant from the perspective of a prudent tax-payer exercising reasonable foresight and due diligence and having proper regard for its responsibilities under the Taxes Acts.

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

- 40 ‘(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]);

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(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]);

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(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]);

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(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]);

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The Appellant's submissions

25. The Appellant's grounds of Appeal as stated in its Notice of Appeal are:

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- i. Appellant is currently making payments but is only 3 months late due to financial difficulties the business is experiencing.
- ii. The penalty is unfair, as HMRC has received the Tax and NIC albeit 3 months late.
- iii. The penalty is unreasonable and disproportionate and will jeopardise the trading activities of the business.
- iv. The Appellant was having problems with their debtors which caused cash flow problems and affected the amount the Appellant could pay to HMRC.

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HMRC's submissions

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26. Payments of PAYE are meant to be made in full and on time. Legislation states that payment should be made by the 19th of the month if paying by cheque, or the 22nd of the month if paying electronically, for the month it is due. PAYE due dates are shown in HMRC's Employers packs. It has never been acceptable to pay late.

27. The penalty is not an interest charge. Penalties were introduced to encourage more employers to pay by the due date and the rates are set by legislation (Schedule 56 Finance Act 2009).
28. The penalty increases in line with the number of PAYE periods not paid on time. The higher the number of PAYE periods not paid on time, the higher the penalty.
29. The Appellant has a long history of non-compliance and HMRC records show that the Appellant has continually paid late since 6 April 2009. During the tax year 2011-12 its PAYE/NIC remittances failed to meet the relevant deadline in every month.
30. The Appellant's non-compliance history demonstrates that the company has ongoing financial problems and that these are not exclusive to the tax year 2012-13. However, cash flow difficulties are invariably part of the hazards of trading rather than an underlying cause outside the control of the Appellant. The Appellant's cash flow problems have not been shown to be beyond those expected in the course of business in difficult economic times. The Appellant's problems have clearly existed for some time
31. The Appellant has on more than one occasion paid the overdue Tax/NIC remittance by credit/debit card.
32. The Appellant was fully aware of the Time To Pay ('TTP') facility as the Appellant was granted TTP in June 2011 in respect of 2010-11, which was subsequently cancelled as current year payments were not maintained.
33. A review of the Appellant's 2012-13 PAYE records shows no evidence of any contact prior to the due date of the payment. The initial contacts were mainly made by HMRC when they chased for payments from the Appellant. There were also Field Force Officer visits. The only contact instigated by the Appellant was after the due date, advising that payment had been made.
34. HMRC are under a legal obligation to impose a penalty in all cases where they have a reasonable belief that a penalty is merited by the facts. It would be unfair to administer penalties in any other way. The Appellant was notified that he may be liable to a penalty after the first default. The Appellant could have found details of the level of the penalty if it had accessed HMRC's website — details were also given in the warning letter.
35. The Appellant says the penalty is extremely high when the payments were "only 3 months late". HMRC contends that the degree of lateness of payment is irrelevant. The fact it is late triggers the penalty and that is the reason the Appellant has been issued with the late filing penalties. Regulation 69 Income Tax (PAYE) Regulations 2003 defines the due date for the monthly PAYE payments as:

Manual payment 14 days after the month end (the 5th of each month) so the PAYE falls due on the 19th, and the penalty date is the 20th

Electronic payment 17 days after the month end (the 5th of each month) so the PAYE falls due on the 22nd, and the penalty date is the 23rd.

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

10 37. HMRC say that the Tribunal cannot consider proportionality and relies on the Upper Tier Tribunal decision in *HMRC v Total Technology (Engineering) Ltd* [2012] UKUT 418 (TC). The penalties are statutory, i.e. imposed by Parliament for a permissible purpose and no greater than is needed to secure compliance with filing and payment obligations. The Tribunal has no power to reduce penalties in the
15 absence of a reasonable excuse.

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

39. Most businesses experience cash flow problems as part of their normal cycle of business. They manage those difficulties as part of their day-to-day operations. The majority of employers do pay on time and paying late gives the Appellant an unfair commercial advantage. It is not enough to pay in full eventually. Parliament expects
25 employers to pay on time. If the Appellant knows it was going to have trouble paying, the proprietors should have contacted HMRC prior to the due date. The Appellant is aware that they can ask for a payment plan as they have contacted HMRC before for a Time To Pay arrangement. As Lord Donaldson MR said in *Customs and Excise Commissioners v Steptoe* [1992] STC 757 at 770:

30 “...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
35 will be exhausted by the date on which such foresight, diligence and regard would have overcome the insufficiency of funds.”

Conclusion

40. The onus is on HMRC to show default, but it is clearly not in dispute that the Appellant was required throughout the relevant year to make monthly payments of
40 PAYE and NICs by the 19th day of each month. The Appellant has accepted that the payments were late and it is therefore for them to show why the penalties should not have been charged. There is no dispute as to the amount of PAYE and NIC required

to be paid by the Appellant in each of the months in question. It is also accepted by the Appellant that each of the payments in respect of which a penalty has been imposed was indeed late. There is also no dispute as to the calculation of the penalties apart from the potential application of paragraphs 9 and 16 of Schedule 56.

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

10 42. The Appellant may have been unaware of the penalty regime but that does not constitute special circumstances. HMRC publicised the late payment penalties for PAYE and NICs extensively both before and after they came into effect. An employer pack including a CD-ROM was mailed to all employers in February 2010, flyers were mailed to employers and factsheets were distributed at face to face events (such as “Employer Talk” and published on the HMRC website). Late payment penalties also
15 featured in issues of Employer Bulletin, on the PAYE pages of the website (and on a podcast), on Businesslink and in published guidance and employer help books. This should have acted as an early warning to the Appellant that the penalty regime was about to change. HMRC made every effort to educate employers on the changes. There was also communication with accountants and other tax agents, and publication
20 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.

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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.’

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

40 44. The Appellant has not demonstrated anything unusual or unexpected beyond problems encountered during the normal course of trade.

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

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

‘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’.

47. The above principles were endorsed by the Upper Tribunal decision in *Total Technology*. We do not consider the penalties to be disproportionate to the defaults involved.

48. The penalty regime may be harsh in order to act as a deterrent, but cannot be described as “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.

49. The Tribunal finds that the Appellant has not established a reasonable excuse for any of the late payments, or that there were special circumstances justifying a mitigation of the penalty. The penalty was not harsh or disproportionate. It therefore follows that the appeal must be dismissed and the penalty assessment of £6,519.96 confirmed.

50. 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: 16 September 2014