# TC02307

**Appeal number: TC/2010/08339**

***CONSTRUCTION INDUSTRY SCHEME – fixed and month 13 penalties - late filing of returns – no reasonable excuse – proportionality of penalties – whether within wide margin of appreciation - interpretation of s100B Taxes Management Act 1970 - Human Rights Act 1998 – appeal allowed in part***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**ANTHONY BOSHER** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE NICHOLAS ALEKSANDER**
**SUSAN HEWETT**

**Sitting in public at Victoria House, London WC1 on 8 and 9 May 2012**

**The Appellant in person**

**Hui Ling McCarthy of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

DECISION

1. This is an appeal by Mr Bosher against penalties of £54,100 imposed by HMRC because HMRC consider that Mr Bosher failed to make monthly returns by the due date under the Construction Industry Scheme ("CIS") for eighteen periods, details of which are set out in the Appendix to this decision.

2. The penalties under appeal were originally £64,400. However, during the course of the appeal process it was established that Mr Bosher last engaged subcontractors during the tax month ended 5 May 2009. HMRC therefore agreed with Mr Bosher to close his registration under the CIS scheme with effect from 5 June 2009, and on 25 January 2011 HMRC wrote to Mr Bosher to notify him that the penalties charged for the periods ended on or after 5 June 2009 were cancelled.

3. In their letter of 25 January 2011, HMRC also offered to reduce the penalties further from £54,100 to £14,600 under s102 Taxes Management Act 1970. This offer was made in accordance with the process announced on HMRC's website on 17 November 2010. Mr Bosher has not accepted this offer; accordingly, this is an appeal against penalties in the full amount of £54,100. However, HMRC have indicated that if this appeal is dismissed, they will nonetheless stand by their offer to reduce penalties under s102 to £14,600.

4. This appeal was originally classified to be determined as a default paper case. On 1 September 2011, in view of the amount of penalties in issue, Judge Aleksander gave directions to reclassify it as a standard case to be determined following full pleadings and an oral hearing.

5. Mr Bosher appeared in person at the oral hearing, and HMRC were represented by Ms Hui Ling McCarthy. Mr Kenneth Claydon, who is the Operational and Technical Manager within HMRC of the CIS submitted two witness statements. We heard oral evidence from Mr Bosher and Mr Claydon. In addition bundles of documentary evidence were submitted, which included print-outs and screen shots from HMRC's computer systems, correspondence between the parties and other documents.

6. At the conclusions of the oral hearing, we gave leave for Mr Bosher to submit further documentary evidence, being copies of various CIS returns, but in the event he chose not to do so.

**Background**

7. The CIS is a tax compliance scheme for businesses operating in the construction industry. This is an industry that has traditionally attracted a large, itinerant workforce and often involves "cash in hand" transactions. Historically, this resulted in a significant loss of tax and national insurance contributions. The problem was summarised by Ferris J. in *Shaw (Inspector of Taxes) v Vicky Construction Ltd* [2002] STC 1544 as follows:

> [3] ... it became notorious that many sub-contractors engaged in the construction industry "disappeared" without settling their tax liabilities, with a consequential loss of revenue to the exchequer.
>
> [4] In order to remedy this abuse Parliament has enacted legislation, which goes back to the early 1970s, under which a contractor is obliged, except in the case of a sub-contractor who holds a relevant certificate, to deduct and pay over to the Revenue a proportion of all payments made to the sub-contractor in respect of the labour content of any sub-contract. The amount so deducted and paid over is, in due course, allowed as a credit against the sub-contractor's liability to the Revenue.

8. Accordingly, the CIS has been in place in various iterations since 1971 to monitor payments made from contractors to sub-contractors in the construction industry. The legal basis of the CIS (as in force from 6 April 2007 – the "2007 Scheme") is at ss57-77, Finance Act 2004 ("FA 2004"), and the Income Tax (Construction Industry Scheme) Regulations 2005 (SI 2005/2045).

9. The CIS requires certain payments made by contractors to sub-contractors to be made subject to deduction of tax (in some circumstances, payments can be made without deduction of tax). Sub-contractors are entitled to claim credit for tax withheld under CIS against their tax liability for the tax year in question.

10. Contractors are required to make a return no later than 14 days after the end of every tax month (a "monthly return"). For these purposes, a tax month means the period beginning with the 6th day of a calendar month and ending on the 5th day of the following calendar month, so a monthly return must be made no later than the 19th day of that month (the "filing date"). Even if a contractor has not paid any subcontractors during the month a return is still required (a "nil return").

11. Contractors are required to account to HMRC for any tax withheld 17 days after the end of the relevant tax month if the payment is made electronically, or 14 days after the end of the tax month if payment is made by other means. These dates translate to the 22nd or 19th of the calendar month respectively. Payment is made alongside PAYE and NICs payments for any employees that a contractor may have. The due date for subcontractor payments is the same as those for PAYE and NICs, and a single payment is made for all these liabilities.

12. If a return is received after the filing date, it will be treated as being late, with the result that the contractor will be liable to a late return penalty for that period. A further penalty is payable for each subsequent month, or part of month, in respect of which the return remains outstanding.

13. Late filing penalties are chargeable each month for each return outstanding after the filing date. The penalty is fixed at £100 per month or part month, per return in respect of each batch (or part batch) of 50 sub-contractors pursuant to ss98A(2)(a) and 98A(3) of the Taxes Management Act 1970 ("TMA 1970"). For example, if a return for the month ended 5 May is not received by 19 May, the following automatic

penalties ("fixed penalties") will be issued on the basis of there being 50 or less subcontractors:

(1) an initial £100 penalty when the return is not made by 19 May;

(2) a second £100 penalty if the return is not made by 19 June;

(3) a third £100 penalty if the return is not made by 19 July and so on, until the return is made or 12 months has elapsed, whichever is the earlier.

14. If the failure continues beyond twelve months there will be an automatic final late return penalty. This is known as the "month 13 penalty". This penalty is charged under s98A(2)(b)(ii) TMA 1970 which provides for a penalty not exceeding £3000 in relation to the late filing of CIS monthly returns.

15. HMRC's policy to calculate the appropriate penalty due is to charge an increasing tariff based on the number of instances a return is over 12 months late in a rolling 12 month period. The tariff amounts are as follows:

(1) 1st occasion - £300

(2) 2nd occasion - £600

(3) 3rd occasion - £900

(4) 4th occasion - £1200

(5) 5th occasion - £1500

(6) Six or more occasions - £3000

16. When the 2007 Scheme was introduced in April 2007, HMRC operated a six month "soft landing period". No penalties for late returns were issued during the soft landing period, to allow taxpayers to adjust to the new system. Instead, contractors were sent reminders advising them of the need to file returns on time, and that penalties would be charged for late returns. Any return which remained outstanding after 19 October 2007 incurred a first fixed penalty.

**The practical operation of CIS by HMRC**

17. On the basis of the evidence before us, we find that the CIS was implemented by HMRC in the following manner:

*CIS Returns*

18. Under the 2007 Scheme, contractors and subcontractors register with HMRC under the CIS. When a contractor engages a subcontractor for the first time, the contractor must contact HMRC (either online or by telephone) to verify the payment status of the subcontractor. As part of the verification process, HMRC will advise the contractor whether the subcontractor can be paid "gross" (without having to withhold tax), or whether withholding is required (and if so whether at the "standard" or the "higher" rate).

19. Contractors may submit their monthly returns to HMRC in a number of ways. Returns can be submitted electronically, either using commercially available software, or proprietary software that contractors may have developed themselves "in house". Contractors who pay fewer than 50 subcontractors each month can also use HMRC's free online system. Nil returns (that is returns for a month in which the contractor has made no payments to subcontractors) can also be made by telephone to HMRC's CIS helpline.

20. Contractors who do not wish to file electronically, and who have not made a nil return by telephone, need to file a paper return on form CIS300. The forms are supplied to contractors by HMRC, and to assist them the returns are "pre-populated". Information already known to HMRC, such as the contractor's own name, address and reference number, are printed on to the form. In addition, HMRC's computer system reviews the contractor's previously submitted returns and verification requests, and includes details of subcontractors recorded on those prior returns. The contractor therefore needs only to enter the amounts paid to subcontractors in the month, and the amount of any deductions made from such payments. If the contractor engages a subcontractor whose details are not pre-printed, then he will also need to enter their details manually.

21. A pre-populated return will include the following details when it is printed by HMRC:

(1) Details of verified subcontractors shown as paid on any of the contractor's three returns previous to the return now being printed; and

(2) Details of subcontractors who have been verified with HMRC by the contractor in the preceding three months, even if they have not yet been paid.

22. The pre-populated returns are printed around the 27th of each calendar month, and posted by HMRC on or around the 1st of the next month, so that contractors can normally expect to receive them by the 5th of the month.

23. So, take as an example the pre-populated return for the tax month ended 5 December 2011. On or around 27 November 2011, the HMRC computer system will review the subcontractor details reported on the contractor's three previous returns (namely for tax months ended 5 September, 5 October and 5 November 2011). This process will determine which subcontractors' details are printed onto the return for the month ended 5 December 2011. On 27 November 2011 the production process will begin for the production of all contractors' CIS300 paper returns for the month ending 5 December 2011. In a typical month, HMRC issue in excess of 70,000 CIS300 return forms. The production process is usually completed in four days and the pre-populated returns are then dispatched via Royal Mail's Mailsort delivery service on 1 December 2011. Mailsort is a special bulk mail service that has a delivery timescale roughly corresponding to second class post. The dates are geared towards getting the returns to contractors by 5 December 2011 at the latest.

24. Enclosed with each return is a pre-addressed return envelope. The return envelope is not postage-paid, and the contractor is required to pay the return postage.

The cost of the postage will depend upon the weight and dimensions of the envelope. The weight is a function of the number of pages in the return, which will depend upon the number of subcontractors engaged by the contractor. Because of the size of the return itself, the envelope is classified as a "large letter" by Royal Mail, and this is clearly marked both in the stamp area on the envelope and on the rear flap.

25. Occasionally contractors spoil or mislay their CIS300. Rarely, contractors contact HMRC's CIS helpline to say that their return has not been received. The helpline receives approximately 20 requests each month for replacement returns from contractors who say that their return has not been received. As 70,000 CIS300 returns are issued each month, a non-receipt rate of 20 is very small. HMRC are not aware of any contractor failing to receive their CIS300 for a number of consecutive months.

26. Should a replacement CIS300 need to be issued, HMRC can provide a blank replacement form on request, but it will not be pre-populated with the subcontractors' details.

*Processing of completed returns*

27. Completed CIS300 returns are processed at HMRC's Rapid Data Capture centre (or "RDC centre") in Liverpool. The RDC centre is operated and managed for HMRC by Fujitsu Ltd, one of HMRC's information technology partners. HMRC's IT partners are collectively known as Aspire (Acquiring Strategic Partners for the Inland Revenue). Aspire are under a contractual obligation to process returns within five days of receipt.

28. Because the processing of returns at the RDC centre is an important operation for HMRC, it is conducted under secure, clean and sterile conditions. The environment is not a typical office, but a dedicated return processing centre. Well documented procedures are in place and are followed to ensure that all returns are handled and scanned in an efficient manner.

29. CIS300 returns are delivered by Royal Mail each weekday to the RDC Centre. The pre-addressed return envelope for CIS300 returns has a dedicated postcode which allows Royal Mail to deliver these returns separately from other mail delivered to the same site (other HMRC returns are processed at the RDC centre).

30. The RDC centre is only open for processing CIS returns on weekdays (excluding public holidays). If the due date for a month (the 19th) falls on a weekend or a public holiday, all returns delivered on the next working day are treated as having been received on the due date.

31. On the day that returns are received, the returns are placed into pallets marked with the date of receipt.

32. The envelopes are opened by the Aspire staff using special slitting machines, and they check the envelope contents immediately on opening. If the content of the

envelope is not solely CIS300 return(s) and continuation sheets, the envelope and all its content is passed to an on-site HMRC team for them to deal with.

33. Returns that do not appear to be complete (for example because they have not been signed) are sent back to the contractor.

34. If the return appears to be complete, it will be placed into another pallet, also marked with the date of receipt. At all times returns received on a particular date are kept physically separate from returns received on other dates.

35. The returns then proceed to the scanning process. All the returns are collated into manageable batch sizes. Each batch of returns is given a separate batch header sheet, showing the date of receipt for that particular batch (or the 19th of the month for returns received on a Monday – or Tuesday – if the due date fell on a weekend or the Monday was a public holiday). Only returns received on the same day are ever batched together, returns received on different dates are never mixed.

36. The returns are scanned, and an electronic image is made of each return. The electronic images of each return are then processed by HMRC's CIS computer system which interprets the entries made in specific fields on the electronic image of the scanned form. As a return passes through the scanner, it is given a unique identification number that indicates its precise position within the batch process on any particular day. This identification number enables each scanned return to be traced to the exact date, time and batch in which it was processed.

37. The scanned image and the interpreted data is then shown on a computer screen to a trained Aspire operator, who confirms in every case whether or not the return was correctly read and interpreted by the CIS computer system. If there are any difficulties, the electronic image is transferred by Aspire to HMRC staff for manual processing.

38. Once the paper returns have been scanned successfully, and the electronic images have all been recorded and securely archived, the paper returns are destroyed. The scanned images are retained by HMRC for seven years.

39. The data that is read and interpreted by the CIS computer system is then automatically processed by the system for the purposes of the CIS scheme. HMRC staff are able to view this data on computer screens.

*Processing CIS payments*

40. Contractors are allocated between HMRC's two accounts offices, in Shipley and in Cumbernauld, on the basis of the geographic location of their business.

41. Where payments are made by cheque, these are sent to the relevant accounts office together with a payment slip that will have been provided to the contractor before the start of the tax year. The payment slip is pre-printed with the contractor's name and reference details, and it will also indicate to which accounts office the payment should be sent.

42. When a payment is received by an accounts office (whether by cheque, electronically, or by some other means), it will be recorded on HMRC's BROCS computer system. The BROCS system (Business Review of the Collection Service) was introduced in around 1984 and handles all employer and contractor payments.

*Issuing Penalties*

43. On or about the last Friday in each calendar month, the CIS computer system will identify every contractor from whom a return was expected but not received by the 19th of that month and for each earlier month (within the last 13 months) for which a return is still outstanding.

44. The information, consisting of the contractor's details and the months for which penalties are due, is then passed electronically from the CIS computer system to a separate HMRC computer system called SAFE (Strategic Accounting Framework Environment). The SAFE system is responsible for issuing penalties, not only for CIS but also for other tax regimes. On receipt of the CIS data, the SAFE system produces all the penalty notices that are due to be issued for that month. Penalty notices are not however produced for contractors for whom HMRC has no current address, or whose records are marked as insolvent or deceased, or (exceptionally) where some human action has set an inhibition within SAFE on issuing a penalty to a particular contractor for the month in question.

45. Once the penalty notice has been produced, an automated process puts it into an envelope. Envelopes are stacked and given to Royal Mail for delivery. The automated process is only able to put up to four penalty notices into any one envelope. So a contractor who is due to receive (say) six or seven penalties in any one month will receive two (or sometimes more) envelopes. As each penalty notice is produced, an electronic flag is set within the SAFE system to show that the penalty notice has been prepared and enveloped.

46. The process is wholly automated, so that there can be virtually no human error. It is possible for things to go wrong (such as a penalty notice failing to be enveloped), but because of the procedures adopted, such events are exceptional. We were told by Mr Claydon that in the five years that the 2007 Scheme has been in operation, he was aware of only two incidents where something had gone wrong with the process, and that in each of those cases the problem was identified and corrected, so that the relevant documents were posted to the contractors.

**The circumstances of Mr Bosher's case**

47. Mr Bosher is a builder. He has been operating as a contractor within the CIS since the 2007 Scheme began on 6 April 2007. Prior to that date, Mr Bosher was registered as a contractor within the old CIS (the "pre-2007 CIS") from 29 January 2004.

48. Under the pre-2007 CIS, Mr Bosher did not submit CIS36 annual returns for 2004/05, 2005/06 and 2006/07. As a consequence of this, Mr Bosher received

penalties of £1,200 for each of the tax years 2005/06 and 2006/07. These penalties were not appealed and Mr Bosher paid these penalties, other than £14.38 which remains outstanding.

49. In outline, Mr Bosher's position in relation to the penalties under appeal is that he made all of his returns on time, he did not receive any penalty notices until 22 June 2010 and the "fines are unjust". He says that he posted all the CIS returns in sufficient time for them to have been received by the due date and he has retained copies. He has argued that he has no control over what happens after the returns were posted.

50. He also maintains that until 22 June 2010 he had not received any penalty notices, and that he only became aware of the penalties on 22 June 2010, the same day that an HMRC officer came to visit him.

51. Mr Bosher moved house on 1 September 2009. He maintains that he informed HMRC of the move at the relevant time.

52. In outline, HMRC's position is that Mr Bosher made eighteen late returns under the 2007 Scheme, which were a mixture of substantive returns (i.e. returns in respect of which CIS deductions needed to be paid over to HMRC) and nil returns.

53. During the periods ended 5 September 2007 to 5 May 2009 inclusive, HMRC have records of receiving the following monthly returns on the following dates:

(1) period ended 5 May 2008 — 19 May 2008 (on time);

(2) period ended 5 July 2008 — 8 July 2008 (on time);

(3) period ended 5 September 2008 — 25 September 2008 (late);

(4) period ended 5 October 2008 — 15 October 2008 (on time); and

(5) period ended 5 November 2008 — 27 November 2008 (late).

54. HMRC's records show that the remaining monthly returns were made in June, July and December 2010:

(1) The following nil returns were notified to HMRC by Mr Bosher by telephone on 28 June 2010:

(a) period ended 5 April 2008; and

(b) periods ended 5 June and 5 August 2008

(2) The following paper returns were delivered on 12 July 2010:

(a) period ended 5 October 2008

(b) periods ended 5 December 2007 to 5 March 2008; and

(c) periods ended 5 December 2008 to 5 April 2009.

(3) The following paper returns were delivered on 24 December 2010:

(a) period ended 5 September 2007

(b) period ended 5 November 2007; and

(c) period ended 5 May 2009.

55. The images included in the bundles before us of the paper returns filed in July 2010 and December 2010 were of blank returns completed by Mr Bosher by hand, rather than pre-populated returns which would have been originally issued to Mr Bosher each month.

56. HMRC further contend that the penalty notices were issued promptly and correctly. In particular, each notice was sent to the current address for Mr Bosher which HMRC had in their records. HMRC's records show that Mr Bosher notified his change of address on 14 December 2009 and that HMRC's records were updated on 15 December 2009. HMRC submit that Mr Bosher has no reasonable excuse for the late returns nor are the penalties unjust (or disproportionate). They submit that the penalties should therefore remain as charged.

57. In his evidence, Mr Bosher told us about his system for managing his CIS returns. Mr Bosher undertakes the administration for his business himself from home. Above his desk is a pinboard, and he pins the CIS300 to the pinboard as soon as it arrives. This ensures that he remains aware that the return has not been completed. Mr Bosher also told us that he was aware that the return envelope required a "large letter" stamp, and that he had purchased a pack of 50 first class large letter stamps from the Post Office when the large letter rate was introduced, so that he had the relevant stamps available.

58. Mr Bosher told us that the CIS300 return could not be completed until after the end of the relevant tax month (being the 5th of the calendar month). It was his practice to complete the return in the week immediately following the 5th, and to make and retain a photocopy of the return. He then posted the return to HMRC on his way to work the following day. This was normally around the 12th of each month. He told us that he did not make copies of nil returns. Other than the photocopy of the return, Mr Bosher did not have any record of posting.

59. Mr Bosher told us that he was never told by HMRC that returns had not been received, and that he had not received any penalty notices until 22 June 2010. He only became aware that returns had not been received and that penalties were payable on 22 June 2010 when Mr Bosher received a bundle of envelopes through the post containing penalty notices for late CIS returns. Coincidentally on that same day, Mr Bosher was visited by an HMRC officer seeking to recover outstanding CIS payments and penalties. Following the visit, Mr Bosher then took steps to bring his CIS filings up-to-date. He made a number of nil returns by telephone on 28 June 2010, and he lodged the remaining outstanding returns on 12 July 2010 and 24 December 2010.

60. Mr Bosher moved on 1 September 2009 from Carshalton to Epsom. He told us that he wrote to HMRC, his bank, credit card company and other persons at that time notifying them of his new address. In addition, approximately four to five weeks after the move, he was telephoned by HMRC's Kingston office, and he also told them about the move.

61. We did not find Mr Bosher's evidence to be credible.

62. As regards the filing of the CIS300 returns, we do not believe Mr Bosher's statement that these had all been posted in sufficient time to have been received by HMRC by the relevant due date.

63. Our reasons for this are as follows.

64. If Mr Bosher is correct, sixteen of his CIS returns over a period of two years have gone totally missing in the post, even though they were posted on time, correctly addressed and stamped with the correct postage. Mr Bosher in evidence stated that the post in his area was unreliable. We might have been prepared to accept that returns had been delayed, or even that one or two might have gone missing. However we do not find it credible that sixteen returns could have disappeared altogether in the post.

65. Nor do we consider, in the light of Mr Claydon's evidence about the procedures adopted at the RDC centre, that sixteen returns could have been received by HMRC at the correct time, yet have subsequently been lost at the RDC centre somewhere in processing.

66. Other evidence supports our view that Mr Bosher did not make his returns on time. First, Mr Bosher had a poor compliance record under the pre-2007 CIS. We also note that of the 2007 Scheme CIS returns that were received by HMRC, almost half were late (this includes the returns submitted during the soft landing period which were not subject to penalties). This confirms that Mr Bosher's procedures for dealing with CIS returns were not as reliable and efficient as he represented in his evidence.

67. On 3 July 2010 Mr Bosher wrote to HMRC appealing against the penalties. In his letter he stated:

> During my telephone call to the CIS Helpline on Monday 28th June I was able to provide details of all the nil returns, some of which your officer already had details.
>
> Of the outstanding 13 returns I have copies of 9 which indicates to me that I sent the originals to [y]our offices at the required times. I enclose copies of these for your records. I am sure that, given time, I will find the remaining 4 which I will forward to you as soon as possible.

68. However no copies were included with the letter. On 13 January 2012 Mr Bosher wrote to HMRC enclosing "copies of the original CIS returns" for the nine periods, including those for the periods ended 5 September 2007 and 5 November 2007. In contrast to the paper returns filed in July and December 2010, these were copies of pre-populated returns. There are also discrepancies between some of these copy returns and the returns previously submitted by Mr Bosher for the same periods. The payments to subcontractors in the copy return for the period ended 5 November 2007 differ from those recorded in the returns for the same period received by HMRC on 12 July 2010 and 24 December 2010. In addition, the copy return for the period ended 5 September 2007 shows payments and deductions of £3432.00 and £858.00

respectively whereas the return for the same period received by HMRC on 24 December 2010 was a nil return.

69. We do not find Mr Bosher's explanation for these discrepancies to be credible. He told us that after his move, he had packed all his files away, and when he came to file the missing returns (after he became aware that they were missing in June 2010) he could not find all of the copies. Because of his move in September 2009, Mr Bosher had boxed and packed away his old files (including his copies of the CIS300 returns). As Mr Bosher could not find a copy of the original returns, in his rush to get the missing CIS returns filed, he retrieved details of the amounts paid to subcontractors from his computerised accounts system and from paper timesheets, and used this information to complete fresh blank CIS300 return forms, which were submitted in July 2010. Mr Bosher told us that because of the mis-match between the tax and calendar month, and because of some data corruption on his computer (of which he was not then aware), the amounts he wrote onto the new CIS300 for the period ended 5 November 2007 had turned out to be inaccurate. However, by December 2010, he had managed to retrieve the "original" copy, and used the information on his copy to complete another blank CIS300 which he filed with HMRC.

70. Mr Bosher told us that the copies enclosed with his letter of 13 January 2012 were photocopies of the original returns that had had been posted on time but had gone missing (either in the post or at the RDC).

71. Because of these discrepancies, and in order to give Mr Bosher the opportunity to support his oral evidence that he had filed CIS300s on time and had retained copies of the original filed forms, at the conclusion of the oral hearing we gave directions to allow Mr Bosher to retrieve the copies of all his original CIS returns from his files and submit them to the Tribunal, so that we could compare these with the copies of the forms HMRC included in their bundles. However he did not provide these copies to the Tribunal.

72. There were produced in evidence before us copies of the electronic images made at the RDC centre of Mr Bosher's CIS returns, showing the relevant batch numbers. We also had print outs of the computerised records on HMRC's CIS computer system, and correspondence between Fujitsu and HMRC which linked the batch numbers to the date the returns were received and processed.

73. We were also given evidence relating to Mr Bosher's history of late payment under CIS, and the procedures he adopted for managing CIS deductions and making CIS payments, but we did not need to take these into account in reaching our findings.

74. Taking into account all the evidence before us, we are satisfied (and we find) that the dates of receipt of the relevant CIS returns by HMRC were as set out in the Appendix to this decision.

75. We also find that Mr Bosher had no reasonable excuse for these returns being filed late. It is implausible that so many returns over a substantial period of time

failed to reach HMRC if they were properly addressed, pre-paid and posted in good time.

76. As regards the penalty notices, we do not find Mr Bosher's evidence credible that he did not receive any of the penalty notices issued by HMRC until 22 June 2010.

77. The evidence before us is, and we find, that HMRC's first penalty notice was issued to Mr Bosher on 3 November 2007, and that further penalty notices were posted on a monthly basis thereafter to the address on HMRC's CIS computer records at the time of issue. We find that in total 209 separate penalty notices were issued and posted to Mr Bosher. HMRC keep records of any post returned by Royal Mail as undelivered. HMRC have no record that any of the penalty notices sent to Mr Bosher were returned.

78. Indeed, the evidence is that post from HMRC did reach Mr Bosher, since he confirmed in his evidence that he received the monthly CIS300 returns (as he pinned these above his desk), and at least some of the CIS300 returns that he filed (admittedly late) were of the pre-populated nature. It would be extremely odd if only penalty notices were lost by Royal Mail, yet the CIS300 returns got through.

79. There is also a note on HMRC's computer system of a telephone call that Mr Bosher had made to HMRC on 14 January 2010. The substance of the call was that Mr Bosher said that he was confused about the CIS system and that he had submitted returns only for liabilities and not for nil returns – and this has generated the penalties. We find that this call had been made to HMRC and was accurately summarised on their computer system. The call supports our finding that at least some penalty notices had been received by Mr Bosher prior to 22 June 2010. The call also is evidence that Mr Bosher was aware, prior to June 2010, (at the very least) that he had not submitted "nil" returns.

80. Screenshots from HMRC's computer system show that Mr Bosher's address as recorded on the CIS computer system changed from an address in Carshalton to an address in Epsom with effect from 15 December 2009. Because of the way in which penalty notices are generated by the CIS and the SAFE systems, penalty notices issued prior to 15 December 2009 could only have been posted to the Carshalton address, and notices issued on or after 15 December 2009 could only have been posted to the Epsom address, because the address used on the penalty notice is the same address as is used by the CIS system. Even allowing for the possibility that penalty notices issued between 1 September 2009 and 15 December 2009 may have been posted to Carshalton, whereas Mr Bosher had by then moved to Epsom, the fact of his move does not explain why penalty notices issued between 3 November 2008 and 31 August 2009, or between 15 December 2009 and 22 June 2010 had not been received.

81. We find that the penalty notices were properly issued by HMRC and posted to the addresses shown on their computer system. We consider that it is implausible that in excess of 200 penalty notices could have gone astray. In the light of our findings about the credibility of Mr Bosher's evidence generally, we find that he only notified

HMRC of his change of address on 14 December 2009. Accordingly we find that as the penalty notices were posted to the addresses shown in HMRC's records according to the information provided to them by Mr Bosher, the penalty notices were validly served in accordance with s115 TMA 1970.

82. To summarise, we find that:

(1) During the periods ended 5 September 2007 to 5 May 2009 inclusive, the following monthly returns were received by HMRC on the following dates:

(a) period ended 5 September 2008 — 25 September 2008; and

(b) period ended 5 November 2008 — 27 November 2008.

(2) The following nil returns were notified to HMRC by Mr Bosher by telephone on 28 June 2010:

(a) period ended 5 April 2008; and

(b) periods ended 5 June and 5 August 2008

(3) The following paper returns were delivered on 12 July 2010:

(a) period ended 5 October 2008

(b) periods ended 5 December 2007 to 5 March 2008; and

(c) periods ended 5 December 2008 to 5 April 2009.

(4) The following paper returns were delivered on 24 December 2010:

(a) period ended 5 September 2007

(b) period ended 5 November 2007; and

(c) period ended 5 May 2009.

83. Accordingly each of these returns was filed after the relevant due date.

84. We also find that Mr Bosher did not have any reasonable excuse for the late filings.

85. Finally we find that the penalty notices issued by HMRC in respect of the penalties due for the late filing of these returns were all properly served on Mr Bosher, having been posted to the address notified by him to HMRC.

**The application of the European Convention to the CIS penalty regime**

86. The Tribunal's directions of 1 September 2011 drew attention to the fact that Mr Bosher’s rights under the European Convention of Human Rights ("the Convention") might be engaged in view of the level of penalties being charged. The Convention has effect as a matter of English law by virtue of the Human Rights Act 1998 ("HRA 1998"). Article 6(1) and article 1 of Protocol 1 to the Convention are potentially relevant to this appeal.

87. We start by mentioning that a number of court and tribunal decisions which consider the application of the Convention to tax, arise in connection with VAT, and the VAT surcharge regime in particular. We recognise that cases concerning the VAT surcharge regime have to be approached with care, as in those cases European Union law was invoked as well as Convention rights. This feature gives the courts a wider jurisdiction than in cases such as this, which do not involve EU law and where the Tribunal's jurisdiction and/or discretion are constrained by the bounds of the HRA 1998. However, the Convention is an important source of EU law, and the issue of proportionality raised in the VAT default surcharge cases was solely based on the basic principal of proportionality, reflecting the jurisprudence of the ECtHR as recognised and developed by the European Union's Court of Justice. Those cases do not raise, for example, the compatibility of a domestic UK measure with the purposes of an EU directive, in the sense of whether the domestic measure is disproportionate because it goes beyond what is necessary to meet EU obligations. Where this more limited approach to proportionality arises in EU law governed cases, there is in fact no material divergence between EU law and the law applicable to Convention rights. We note that Lord Phillips MR (as he then was) observed in his decision in *Lindsay v Customs & Excise Commissioners* [2002] 1 WLR 1766 (as noted in *Greengate Furniture Ltd v Customs & Excise Commissioners* [2003] V&DR 178 at paragraph 88) that it did not seem to him that the doctrine of proportionality in EU law adds significantly to the Strasbourg (viz Convention) jurisprudence. Of course we recognise that the remedies available to this Tribunal in cases subject to EU law are very different from cases such as this, which are not, and we take this into account later in our decision.

88. So far as is relevant, article 6 of the Convention reads:

> 1. In determination of his civil rights or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> (b) to have adequate time and the facilities for the preparation of his defence;
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

89. Article 1 of the First Protocol ("art 1/1") to the Convention provides as follows:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

90. Section 1(1) HRA 1998 defines "Convention rights" for the purposes of the Act to include Articles 6 and 1/1 of the Convention.

91. Section 3 HRA 1998 provides that UK primary and subordinate legislation must be read and given effect in a way which is compatible with Convention rights:

> (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
>
> (2) This section--
>
> (a) applies to primary legislation and subordinate legislation whenever enacted;
>
> (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
>
> (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

92. Section 4 HRA 1998 permits various "courts" to make a declaration of incompatibility where UK primary legislation is not compatible with Convention rights.

93. Acts of public authorities are regulated by s6 HRA 1988 which provides:

> (1)It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
>
> (2) Subsection (1) does not apply to an act if--
>
> (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
>
> (b) in the case of one or more provisions of or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.
>
> (3) In this section "public authority" includes--

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

(4) […]

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.

(6) "An act" includes a failure to act but does not include a failure to-

(a) introduce in, or lay before, Parliament a proposal for legislation; or

(b) make any primary legislation or remedial order.

94. Proceedings in respect of unlawful acts of public authorities are set regulated by s7 HRA 1998 which provides, so far as is relevant:

(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may-

(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or

(b) rely on the Convention right or rights concerned in any legal proceedings,

but only if he is (or would be) a victim of the unlawful act.

(2) In subsection (1)(a) "appropriate court or tribunal" means such court or tribunal as may be determined in accordance with rules; and proceedings against an authority include a counterclaim or similar proceeding.

[…]

(6) In subsection (1)(b) "legal proceedings" includes--

(a) proceedings brought by or at the instigation of a public authority; and

(b) an appeal against the decision of a court or tribunal.

(7) For the purposes of this section, a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act.

(8) Nothing in this Act creates a criminal offence.

(9) In this section "rules" means--

(a) in relation to proceedings before a court or tribunal outside Scotland, rules made by . . . [the Lord Chancellor or] the Secretary of State for the purposes of this section or rules of court,

[…]

(10) In making rules, regard must be had to section 9.

95. Judicial remedies within the ambit of the HRA 1998 are set out in s8 which provides, so far as is relevant:

> (1)In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.
>
> […]
>
> (6) In this section--
>
> "court" includes a tribunal;
>
> "unlawful" means unlawful under section 6(1)

*Right to a fair trial under Article 6*

96. The assessment of tax and the imposition of penalties falls outside the scope of art 6 of the Convention under its civil head (see *Ferrazzini v Italy* (Application 44759/98) [2001] STC 1314). However, the Grand Chamber of the European Court of Human Rights (the "ECtHR") has determined that in certain circumstances the criminal head of art 6 is engaged in respect of civil penalties (see *Jussila v Finland* (Application 73053/01) [2009] STC 29.

97. In *Jussila*, the ECtHR determined that there were three criteria to be considered in deciding whether the criminal head of art 6 was engaged (based on a synthesis of reasonings in earlier cases):

> (1) the classification of the offence as criminal, administrative/disciplinary, or both, must be ascertained; however, this provides no more than a starting point of somewhat formalistic value and is not in itself decisive;
>
> (2) of far greater importance is the nature of the offence;
>
> (3) the nature and severity of the penalty must also be considered: in other words, is it intended as monetary compensation for damage or instead to punish and deter?

98. HMRC submits that the criminal head of art 6(1) is not engaged in respect of the CIS penalties imposed under s98A TMA 1970:

> (1) The "offence" in this case is merely administrative (i.e. the failure to file monthly returns on time);
>
> (2) The nature of the offence in this case requires no proof of qualitative misconduct on the part of the taxpayer. No allegation of dishonesty or even negligent conduct needs to be established in order for a taxpayer to be liable to a penalty under s98A TMA 1970. All that is required is for a return to be filed after the proper filing date.
>
> (3) The penalties in this case are simply an administrative means of securing the production of timely returns; they are an administrative spur to encourage compliance. Their aim is to remedy the default, rather than to punish or deter.

99. We disagree. In *Jussila*, the Finnish tax authorities found deficiencies in the taxpayer's bookkeeping, and reassessed his liability to VAT. In addition the tax authorities levied a surcharge of 10% of the additional VAT assessed. The surcharge was equivalent to a little over €300. The question that was in issue before the ECtHR was whether the taxpayer had a right to an oral hearing under art 6 in relation to his appeal against the surcharge. At paragraph 31 of its decision, the ECtHR said that the second and third criteria are alternative and not necessarily cumulative

> The relative lack of seriousness of the penalty cannot divest an offence of its inherently criminal character

100. The court went on at paragraph 38 to note that the purpose of the penalties was not to represent pecuniary compensation for damage, but as a punishment to deter reoffending.

> It therefore may be concluded that the surcharges were imposed by a rule whose purpose was deterrent and punitive. Without more, the court considers that this establishes the criminal nature of the offence. [….] Hence art 6 applies under its criminal head notwithstanding the minor nature of the tax surcharge

101. We consider that the penalties imposed under CIS are intended to punish non–compliance, and accordingly are criminal in nature for the purposes of art 6 of the Convention. Although the underlying purpose of the legislation may be to encourage compliance and the filing of timely returns, the legislation (or at least this aspect) operates by way of a stick, rather than a carrot – the penalties are intended to deter non-compliance rather than to encourage compliance. The penalties are punitive in nature, and therefore engage art 6.

102. However, we consider that Mr Bosher's rights under art 6 have not been breached. In the circumstances of this case, the only right that might be in point is his right under art 6(3)(a) to be informed promptly. We have found that Mr Bosher was notified of the imposition of each penalty by a penalty notice sent through the post. The fact that the penalty notices were issued within one month of the penalty arising, we consider to be sufficiently prompt for the purposes of Mr Bosher's Convention rights in this case.

*Proportionality of penalties*

103. HMRC acknowledge that the imposition of a penalty for a failure to file a CIS return is an interference with the peaceful enjoyment of possessions for the purposes of art 1/1, as it involves a deprivation of possessions within the second sentence of that article. However, art 1/1 explicitly recognises the right of States to secure the payment of taxes or other contributions or penalties. In this respect, it has been recognised that whilst the imposition of fixed penalties to secure compliance by taxpayers with their obligations to file returns is a deprivation of possessions, it is one that is in principle permitted within the second paragraph of art.1/1 (*Bysermaw Properties Ltd v HMRC* [2008] STC (SCD) 322 at para 56).

104. However, the reservation in favour of the rights of States to secure payment of taxes and penalties in the second paragraph of art 1/1 is itself subject to the principles underlying the Convention – namely that the provision adopted must be a proportionate means to achieve the end sought. The ECtHR has held that an interference with the entitlement to peaceful enjoyment of possessions in the light of the second paragraph of art 1/1:

> must achieve a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. [...] there must therefore be a reasonable relationship of proportionality between the means employed and the aims pursued. (*Gasus Dosier und Fordertechnik v Netherlands* (1995) 20 EHHR 403 at [62]).

105. Nevertheless the ECtHR has also held that–

> a contracting State, not least when framing implementing policies in the area of taxation, enjoys a wide margin of appreciation and the court will respect the legislature's assessment in such matters unless it is devoid of reasonable foundation (*National and Provincial Building Society v UK* [1997] STC 1466 at [80]).

106. In *International Transport Roth GmbH v Home Secretary* [2002] 3 WLR 344, which involved a scheme which provided for fixed penalties of £2,000 to be levied against lorry owners and drivers for each clandestine immigrant found on their vehicle without any power to mitigate, Simon Brown LJ (as he then was) said (at [52]):

> It is further implicit in the concept of proportionality, however, that not merely must the impairment of the individual's rights be no more than necessary for the attainment of the public policy objective sought, but also that it must not impose an excessive burden on the individual concerned ..."

and he formulated the relevant question as follows (at [26]):

> Is the scheme not merely harsh but plainly unfair so that, however effectively that unfairness may assist in achieving the social goal, it simply cannot be permitted?

107. The case of *Greengate Furniture Ltd v Customs & Excise Commissioners* [2003] V&DR 178 concerned the proportionality under EU and under the Convention of default surcharges arising from the late payment of VAT. The VAT and Duties Tribunal heard submissions over several days, including those of *amicus curiae*. The VAT and Duties Tribunal noted that under the VAT default surcharge scheme, the surcharges were tax-geared by reference to unpaid VAT liabilities, and traders generally receive a surcharge liability notice after the first default in one year and escape the regime after a year without defaults. The first default does not however result in a surcharge liability, but only entry into the regime. It will however result in notification to the trader of his entry into the regime and the consequences. In addition HMRC operate what the VAT and Duties Tribunal at para 43 described as "administrative reductions", whereby no surcharges calculated at the 2% or 5% rates are issued for less than £400. The regime provides for increasingly severe surcharges

as the frequency of defaults increases during a time when a trader is in the regime. A reasonable excuse defence is available in appropriate cases against the imposition of a VAT default surcharge.

108. Against that background the VAT and Duties Tribunal concluded that the legislature had a wide margin of appreciation when framing policies in the area of taxation and that a system of penalties based on automatic assessment was necessary to ensure compliance.

109. Nevertheless, was the regime a proportionate measure in the appellant's circumstances? At paragraphs 92 to 94, the VAT and Duties Tribunal considered the application of art 1/1 generally:

> 91. The imposition of a penalty such as a default surcharge involves a deprivation of possessions within the second sentence. The enforcement of the obligations to make VAT returns and to pay VAT is clearly in the public interest. The default surcharge regime is laid down by statute and is therefore "subject to conditions provided for by law". No question of international law arises in this appeal.
>
> 92. Although the wording of the second paragraph of Article 1 is very wide indeed, it must be construed in the light of the general principle in the first sentence of the Article ("the first rule"), see *Gasus Dosier* (1995) 20 EHRR 403. At paragraph 62 the European Court of Human Rights said,
>
> > "According to the Court's well-established case-law, the second paragraph of Article 1 of Protocol No. l must be construed in the light of the principle laid down in the Article's first sentence …. Consequently, an interference must achieve a 'fair balance' between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The concern to achieve this balance is reflected in the structure of Article 1 as a whole, including the second paragraph: there must therefore be a reasonable relationship of proportionality between the means employed and the aim pursued."
>
> 93. In *National and Provincial Building Society v UK* [1997] STC 1466, the European Court of Human Rights after referring to the above paragraph in *Gasus Dosier* said at paragraph 80,
>
> > "… in determining whether this requirement has been met, it is recognised that a contracting State, not least when framing implementing policies in the area of taxation, enjoys a wide margin of appreciation and the court will respect the legislature's assessment in such matters unless it is devoid of reasonable foundation, see *Gasus Dosier*."
>
> 94. The issue of proportionality under Article 1 of the First Protocol was considered by the Court of Appeal in *Roth* [2002] 3 WLR 344 which concerned fixed penalties imposed on carriers for every concealed asylum-seeker found in their vehicles. Simon Brown LJ said this at paragraphs 51 and 52,

> "51. As to what proportionality involves, I turn to Lord Steyn's speech in *R (Daly) v Home Secretary* [2001] 2 AC 532 at para 17:
>
> > 'The contours of proportionality are familiar. In *de Freitas* [1999] 1 AC 69 the Privy Council adopted a three stage test. Lord Clyde observed, at p.80, that in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself. 'whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."
>
> 52. It is further implicit in the concept of proportionality, however, that not merely must the impairment of the individual's rights be no more than necessary for the attainment of the public policy objective sought, but also that it must not impose an excessive burden on the individual concerned …"
>
> The Court of Appeal, while acknowledging the degree of deference owed by the courts to Parliament, held by a majority that the legislation was disproportionate.

110. The VAT and Duties Tribunal then turned to address the issue of proportionality. At paragraphs 96 to 98, its conclusion in the light of its examination of the cases is that—

> 96. It is clear that a system of penalties is necessary to ensure compliance and that, given that some 12 to 14 per cent of the 1.7 million registered traders still default in any one year, a system of surcharges is necessary based on the automatic assessment of penalties in given fact situations. A tax based penalty in which the percentage depends on the number of defaults is a logical system which takes account of two important aspects of the gravity of the infringement – the amount of tax involved and the compliance record of the trader.
>
> 97. The fact remains however it is a blunt instrument which only takes limited account of the blameworthiness of the trader. If the trader cannot establish a reasonable excuse, the legislation takes no account of the difference between the trader who has made a genuine effort to comply albeit without success and the trader who has made very little effort and it takes no account whatever of the extent of lateness. Either the trader is on time or he is not; either he exercises due diligence or he does not. No account is taken of the degree of culpability. Indeed a trader may properly and reasonably rely on another to prepare his return and yet be liable for the dilatoriness of that other person; a defaulting trader is often criticised before the Tribunal for failing to obtain the necessary help when under pressure.
>
> 98. In our opinion any lack of proportionality caused by those aspects of the regime would be met if there was a proper power to mitigate exercisable by the Tribunal. Any such power would be on a case by case basis although in order to promote consistency it would be

> necessary for the Tribunal and the Commissioners to develop guidelines."

111. The VAT and Duties Tribunal then turned to consider whether the absence of any power to mitigate was "strictly necessary" or went "further than is necessary in order to obtain the objective". At paragraph 110 the Tribunal concluded that

> 110. We find the justifications for the absence of a power to mitigate to be less than convincing. Viewed as at the time of the surcharges under appeal, it does not seem to us that the absence of a power to mitigate is strictly necessary, see *Louloudakis*, and it seems to us that without such power the regime arguably goes "further than is necessary", see *Garage Molenheide*.

112. Nevertheless, in paragraph 111 the VAT and Duties Tribunal notes that the legislature has "a wide margin of appreciation" when framing implementation policies in the area of taxation and in paragraph 113 it says that it is unable to conclude that the system of default surcharges is "devoid of reasonable foundation" or "plainly unfair". However the VAT and Duties Tribunal did not rule out the possibility that there could be cases where the default surcharge could be described as "plainly unfair", even if the surcharges levied against the taxpayer in *Greengate* was not one of them (see paragraph 113).

113. In *Enersys Holdings UK Limited v HMRC* [2010] UKFTT 20 (TC) the First-tier Tribunal reached the conclusion that there were circumstances where a penalty levied under the VAT default surcharge regime could be disproportionate. In *Greengate Furniture*, the VAT and Duties Tribunal placed great emphasis on the absence of any power (either of the tax authority or of the courts) to mitigate penalties. In *Enersys* the Tribunal reached the conclusion that in the particular circumstances of the case before it, the particular VAT default surcharge imposed was disproportionate.

114. The Tribunal in *Enersys* placed the issue of proportionality in the following context:

> 61. […] it seems to me that a pertinent question to ask is whether, if the penalty were not determined mechanically but by a court or tribunal with the power to set any monetary penalty it chose without statutory constraint, that court or tribunal, exercising ordinary judicial discretion, would impose a penalty of as much as £130,000 for an error of this kind. In my view the answer is obvious: it is unimaginable that such a high penalty would be imposed. It is worth returning briefly to my rejection of Mr Conlon's argument relating the penalty to interest, in order to repeat that the penalty is just that; it is not a means of compensating the Commissioners for being out of their money. They may additionally assess for interest, though I understand they generally do not do so, at least when the delay is comparatively short. The fact remains, however, that a taxable person who pays late is liable to pay interest as well as a penalty, a factor which should be borne in mind when fixing the amount of the latter. I should add that I have considered whether it is also a relevant factor that the Commissioners are able to impose a penalty and require the payment of interest when

most other creditors are unable to do either, but have concluded that it is not. Taking the penalty imposed in this case in isolation, though against the background of the public interest in the prompt payment of taxes, it seems to me that it is an inescapable conclusion that it is disproportionate.

62. In reaching that conclusion I have derived some assistance from *Mamidakis*, which itself drew on the judgment of the European Court of Justice in *Louloudakis v Greece* (Case C-262/99), in which it observed that an essentially fixed (but high) penalty "is compatible with the principle of proportionality only in so far as it is made necessary by overriding requirements of enforcement and prevention, when gravity of the infringement is taken into account". The Court concluded in *Mamidakis* that the penalties imposed on the applicant amounted to a disproportionate measure imposing an excessive financial burden, despite its acceptance of Greece's argument that the problem it faced, of oil smuggling, was serious, that the applicant was found to have been guilty of wilful misconduct and this was not his first offence.

63. The judgment and the reasoning are not altogether easy to understand, and it is unfortunate that at para 48 the Court merely declared the penalties disproportionate, even allowing for the state's margin of appreciation, without giving any guidance, even in the most general terms, about the level at which it thought a proportionate penalty might have been set. It is also true that neither the gravity of the conduct in *Mamidakis* nor the magnitude of the penalties is readily comparable with the corresponding features of this case. However, what is apparent from the judgment, as well as from *Louloudakis*, is that the imposition of a high penalty cannot be justified merely because it is the product of a mechanical scheme, or because it is a multiple of the tax in issue; the requirement of proportionality remains.

64. Those conclusions do not, however, dispose of the matter since, as has been repeatedly pointed out, not only does the state has a wide margin of appreciation, but the courts and tribunals should also not strike down a scheme or an individual penalty save in exceptional circumstances. One should be particularly careful in the case of a penalty scheme recommended, as the default surcharge was, by a committee headed by a distinguished judge. In its report the committee said, at para 1.5.1(b), that

> "The scope for administrative discretion should be reduced to a minimum, so that it is available only where required for strictly practical reasons. As a general rule particular consequences should follow particular acts or omissions in every case. In this way, everyone knows where they stand, and compliance is likely to be improved. If everyone is treated alike, grounds for complaint are minimised, provided always that the sanction is regarded as broadly fair."

65. That observation suggests that a high penalty such as that imposed here should be regarded as an acceptable, perhaps desirable, even if individually burdensome, consequence of the scheme. It was, however,

> made against the background of the committee's recommendation, not accepted by Parliament, that penalties be geared directly to both the amount of tax outstanding and the period of delay (it suggested a small fixed percentage of the tax for each day's delay), and that there should be some, albeit very limited, possibility of mitigation in exceptional cases. It is a matter for speculation whether the observation would have been made in the terms I have quoted had the committee known that the penalty would be the same regardless of the delay, and that mitigation would never be available. I think it is a reasonable assumption, however, that it would not have considered a scheme which penalised one day's inadvertent delay in exactly the same way as a month's deliberate non-payment as "broadly fair". Had the committee's proposals for linking the penalty to both the tax and the period of delay been accepted, the penalty imposed on EHUK would have been only one tenth of that actually imposed.
>
> 66. At this point it seems to me that Mr Conlon's comparison of the default surcharge regime with the new penalty system introduced in relation to other taxes by the Finance Acts 2007 to 2009 is pertinent. The objective is the same: to ensure that those liable to pay tax account for it promptly. Although the new system is arbitrary in that the penalties imposed are fixed, they are on the whole lower, they usually reflect the length of the delay even if in a broad-brush fashion, are in many cases also linked to the amount of tax outstanding and in most cases, at least when the penalty is of more than a relatively nominal sum, there is the possibility of mitigation. It is an obvious question, why the penalties for the late payment of VAT, as far as I know uniquely, should be so much more severe than those imposed for the late payment of other taxes.

115. In *SKG (London) Limited v HMRC* [2009] UKFTT 341 (TC) the First-tier Tribunal considered the proportionality of fixed penalties under CIS:

> 40. In this case, as in *Greengate Furniture Ltd* the aspect of the penalty regime which most concerns us from the point of view of lack of proportionality is the absence of any power in the Tribunal to mitigate penalties for late returns under the CIS in a proper case.
>
> 41. We note that, unlike the VAT default surcharge regime, the CIS late filing penalties in issue are not tax-geared and impact on a contractor without prior notice from HMRC. Thus the penalties impact very harshly on contractors with small liabilities to account under the CIS in comparison with contractors with high liabilities. Further, contractors who are not advised in relation to the scheme are in practice at a severe disadvantage compared with contractors who are so advised.
>
> 42. In contrast, in *Greengate Furniture Ltd.*, Counsel for the Commissioners had stressed that the fact that the VAT default surcharge was issued after a warning and that it was geared to the tax unpaid were indications of a reasonable relationship of proportionality between the penalty and the public objective sought to be met by it (*ibid.* at [56]).

116. Because of the doubts that the Tribunal had about the proportionality of the CIS fixed penalty regime, it adjourned the appeal for relisting for further argument on the proportionality issue. However, before the adjourned hearing took place, HMRC withdrew the penalties, and the appeal was therefore formally allowed (see [2010] UKFTT 89 (TC)). The Tribunal therefore never reached a final decision about the proportionality of CIS fixed penalties.

117. HMRC submits that insofar as fixed penalties under s98A(2)(a) TMA 1970 are concerned, there is nothing disproportionate about a £100 penalty per month per late return: the requirement to complete and file a monthly return is not particularly onerous. Moreover, a single penalty for a late filing default is not particularly high. The high penalties incurred by Mr Bosher in this case are as a result of the extreme and repeated nature of his default (see by analogy *Bysermaw* at para 80).

118. Insofar as the month 13 penalties under s98A(2)(b) TMA 1970 are concerned, HMRC submits that there is nothing disproportionate about these either, bearing in mind that they are imposed according to a tariff determined according to the severity of the default at issue. Moreover, HMRC submits that it is not relevant for the Tribunal to consider the question of "disproportionality" in respect of the month 13 penalties *per se* given that the Tribunal has full discretion to mitigate these penalties under the legislation as it currently stands (i.e. s100B(2)(b)(ii) TMA 1970) without HRA 1998 being invoked.

119. Finally, HMRC submits that when considering the question of proportionality, the Tribunal should not look in isolation at the total amount of penalties determined (£54,100) but should look at the regime as a whole, taking into account in particular, HMRC's statutory power to mitigate at s102 TMA 1970. Accordingly, the question for the Tribunal is not simply "Is a penalty of £54,100 proportionate to the defaults in this case?" Instead, the Tribunal should ask itself whether the penalty regime is proportionate in this case, in the light of the clarification from HMRC that the penalties will be mitigated to £14,600 following the Tribunal's determination of the appeal.

120. We agree with HMRC's submissions in relation to the proportionality of the month 13 penalties. Both HMRC and this Tribunal have wide discretion in determining the amount of any month 13 penalty payable. We go on to consider later in this decision the amount of the month 13 penalties.

121. However, we consider that in the circumstances of this particular case, the fixed penalty regime operates disproportionately upon Mr Bosher. The fixed penalties under appeal amount to £19,300, these not merely harsh but are plainly unfair. The aggregate tax shown as deductible on those returns amounts to less than £6000 – although we recognise that some of the CIS returns were filed more than 3 years after their due date. In our view, as was the case in *Enersys*, it is unimaginable that any court or tribunal would impose penalties of this amount for these defaults.

122. In reaching this conclusion, we have taken into account the absence of any power in the Tribunal to mitigate penalties for late returns under the CIS. We

recognise that compliance penalties must be set at a level which discourages non-compliance, even when the amount of tax to be declared on a return is small. However, we have also taken account of the fact that (unlike the VAT default surcharge regime) the CIS fixed penalties are not tax-geared and impact on a contractor without prior notice from HMRC. Thus the penalties impact very harshly on contractors with small liabilities to account under the CIS in comparison with contractors with high liabilities.

123. HMRC in their submissions placed great stress on the fact that there was a separate and distinct default for each month (up to and including month 12) for which a CIS return was not filed, and that the penalty for each such default was only £100. However, in assessing proportionality, we consider that the overall impact of the penalties on the taxpayer needs to be taken into account, and each separate penalty cannot be considered in isolation.

124. In reaching our decision, we have taken into account the offer by HMRC to mitigate the penalties to £14,600 pursuant to their powers under s102 TMA 1970. HMRC contends that when considering the question of proportionality, we should not look in isolation at the total amount of penalties determined (£54,100) but should look at the regime as a whole, taking into account HMRC's statutory power to mitigate under s102 TMA 1970. Accordingly, HMRC submit that the question for us is not simply "Is a penalty of £54,100 proportionate to the defaults in this case?" Instead, we should ask ourself whether the penalty regime is proportionate in this case, in the light of the clarification from HMRC that the penalties will be mitigated to £14,600 following our determination of the appeal.

125. The background to this offer is that Schedule 55, Finance Act 2009 ("FA 2009") provides for a new penalty regime for the late filing of returns generally (not just CIS returns). The regime came into force for CIS monthly returns with effect from 6 October 2011 and applies to returns due to be filed on or after 19 November 2011. In November 2010, in the light of the new CIS penalty regime shortly coming into force, HMRC introduced a revised policy for considering mitigation of CIS penalties under s102 TMA 1970 for late contractor monthly returns required under the 2007 Scheme. This policy was announced on HMRC's website. HMRC would compare the penalties charged under s98A TMA 1970 to the amounts that would be charged under Sch 55 FA 2009. If the penalties under the new regime were less, HMRC offered to mitigate the s98A TMA 1970 penalties to the lower amount using their discretion under s102 TMA 1970.

126. But we have reached the conclusion that we should not take account of HMRC’s offer. First, the offer was rejected by Mr Bosher, and the appeal before the Tribunal relates to the penalties actually imposed under s98A TMA 1970. Any decision by HMRC to mitigate penalties under s102 would only be made after the Tribunal had reached its decision, and would be wholly outside the jurisdiction of this Tribunal. Secondly, if we took into account HMRC’s offer, we would (implicitly) be making a decision on the proportionality of the sch 55 FA 2009 regime. As we had heard no evidence about the operation of the new regime, we considered that we were not in a position to make any determination as to its proportionality.

**Remedies**

127. Section 100B TMA 1970 sets out the right of appeal for taxpayers against various penalties (including penalties imposed for late CIS returns) and the extent of the Tribunal's jurisdiction. The relevant provision is subsection (2) as follow:

> (2) On an appeal against the determination of a penalty under section 100 above section 50(6) to (8) of this Act shall not apply but—
>
> (a) in the case of a penalty which is required to be of a particular amount, the First-tier Tribunal may—
>
> (i) if it appears that no penalty has been incurred, set the determination aside,
>
> (ii) if the amount determined appears to be correct, confirm the determination, or
>
> (iii) if the amount determined appears to be incorrect, increase or reduce it to the correct amount,
>
> (b) in the case of any other penalty, the First-tier Tribunal may—
>
> (i) if it appears that no penalty has been incurred, set the determination aside,
>
> (ii) if the amount determined appears to be appropriate, confirm the determination,
>
> (iii) if the amount determined appears to be excessive, reduce it to such other amount (including nil) as it considers appropriate, or
>
> (iv) if the amount determined appears to be insufficient, increase it to such amount not exceeding the permitted maximum as it considers appropriate.

128. Accordingly, in the case of fixed £100 penalties, any penalty determination may only be set aside if it appears to the Tribunal that no penalty has been incurred. Otherwise, the Tribunal can only reduce or increase the penalty if the amount determined appears to be "incorrect". In the case of any other penalty, the determination may only be set aside if it appears to the Tribunal that no penalty has been incurred. Otherwise, the Tribunal can reduce or increase the penalty if the amount determined appears to be "excessive" or "insufficient" respectively.

129. In respect of the fixed monthly penalties under s98A(2)(a) TMA 1970, HMRC submit that the Tribunal has no statutory power to mitigate. If it appears to the Tribunal that no penalty has been incurred, the Tribunal may set it aside. The Tribunal can only reduce the amount in the event that it appears to it to be "incorrect". As has been recognised by the Tribunal in previous cases (such as *Bells Mills Developments Ltd v HMRC* [2009] UKFTT 390 (TC) and *Brian Lewis v HMRC* [2010] UKFTT 327 (TC)) HMRC submit that it has no discretion in relation to reduce these penalties otherwise.

130. In *Auntie's Café Limited v HMRC* SPC 00588, the Special Commissioner considered that he had jurisdiction to discharge fixed monthly penalties in the event

that were disproportionate (although he did not find that to be the case on the facts before him). This was on the basis that HMRC should have remitted the penalties under s102 TMA 1970 and, if HMRC failed to do so, the General/Special Commissioners had the power to intervene on the grounds that HMRC would have acted unlawfully within the meaning of s6(1) HRA 1998.

131. In contrast, in *Bysermaw*, the Special Commissioner held that HMRC's actions were protected from being "unlawful" by s6(2)(b) HRA 1998; the decision in *Bysermaw* has been recently followed in this Tribunal in *Yuriy Koleychuk v HMRC* ([2012] UKFTT 224 (TC) at para71).

132. Section 3(1) HRA 1998 provides that:

> (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

133. The meaning of this provision was considered by the House of Lords in the case of *Ghaidan v Godin-Mendoza* [2004] 2 AC 557. Although Lord Millett gave a dissenting speech, a clear majority of their Lordships gave an expansive meaning to the application of this provision. Lord Nicholls said the following:

> 28. One tenable interpretation of the word 'possible' would be that section 3 is confined to requiring courts to resolve ambiguities. Where the words under consideration fairly admit of more than one meaning the Convention-compliant meaning is to prevail. Words should be given the meaning which best accords with the Convention rights.
>
> 28. This interpretation of section 3 would give the section a comparatively narrow scope. This is not the view which has prevailed. It is now generally accepted that the application of section 3 does not depend upon the presence of ambiguity in the legislation being interpreted. Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, section 3 may nonetheless require the legislation to be given a different meaning. The decision of your Lordships' House in *R v A (No 2)* [2002] 1 AC 45 is an instance of this. The House read words into section 41 of the Youth Justice and Criminal Evidence Act 1999 so as to make that section compliant with an accused's right to a fair trial under article 6. The House did so even though the statutory language was not ambiguous.
>
> 30. From this it follows that the interpretative obligation decreed by section 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear. In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation. The question of difficulty is how far, and in what circumstances, section 3 requires a court to depart from the intention of the enacting Parliament. The

answer to this question depends upon the intention reasonably to be attributed to Parliament in enacting section 3.

31. On this the first point to be considered is how far, when enacting section 3, Parliament intended that the actual language of a statute, as distinct from the concept expressed in that language, should be determinative. Since section 3 relates to the 'interpretation' of legislation, it is natural to focus attention initially on the language used in the legislative provision being considered. But once it is accepted that section 3 may require legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear, it becomes impossible to suppose Parliament intended that the operation of section 3 should depend critically upon the particular form of words adopted by the parliamentary draftsman in the statutory provision under consideration. That would make the application of section 3 something of a semantic lottery. If the draftsman chose to express the concept being enacted in one form of words, section 3 would be available to achieve Convention-compliance. If he chose a different form of words, section 3 would be impotent.

32. From this the conclusion which seems inescapable is that the mere fact the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention-compliant interpretation under section 3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is 'possible', a court can modify the meaning, and hence the effect, of primary and secondary legislation.

33. Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend Lord Rodger of Earlsferry, “go with the grain of the legislation”. Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation.

134. Lord Steyn gave an extensive analysis of the application of section 3(1) HRA 1998 (with which the majority of their Lordships agreed):

44. It is necessary to state what section 3(1), and in particular the word "possible", does not mean. First, section 3(1) applies even if there is no ambiguity in the language in the sense of it being capable of bearing two possible meanings. The word "possible" in section 3(1) is used in a

different and much stronger sense. Secondly, section 3(1) imposes a stronger and more radical obligation than to adopt a purposive interpretation in the light of the ECHR. Thirdly, the draftsman of the Act had before him the model of the New Zealand Bill of Rights Act which imposes a requirement that the interpretation to be adopted must be reasonable. Parliament specifically rejected the legislative model of requiring a reasonable interpretation.

45. Instead the draftsman had resort to the analogy of the obligation under the EEC Treaty on national courts, as far as possible, to interpret national legislation in the light of the wording and purpose of directives. In *Marleasing SA v La Comercial Internacional de Alimentación SA* (Case C-106/89) [1990] ECR I-4135, 4159 the European Court of Justice defined this obligation as follows:

> "It follows that, in applying national law, whether the provisions in questions were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty"

Given the undoubted strength of this interpretative obligation under EEC law, this is a significant signpost to the meaning of section 3(1) in the 1998 Act.

46. Parliament had before it the mischief and objective sought to be addressed, viz the need "to bring rights home". The linch-pin of the legislative scheme to achieve this purpose was section 3(1). Rights could only be effectively brought home if section 3(1) was the prime remedial measure, and section 4 a measure of last resort. How the system modelled on the EEC interpretative obligation would work was graphically illustrated for Parliament during the progress of the Bill through both Houses. The Lord Chancellor observed that "in 99% of the cases that will arise, there will be no need for judicial declarations of incompatibility" and the Home Secretary said "We expect that, in almost all cases, the courts will be able to interpret the legislation compatibly with the Convention": Hansard (HL Debates,) 5 February 1998, col 840 (3rd reading) and Hansard (HC Debates,) 16 February 1998, col 778 (2nd reading). It was envisaged that the duty of the court would be to strive to find (if possible) a meaning which would best accord with Convention rights. This is the remedial scheme which Parliament adopted.

47. Three decisions of the House can be cited to illustrate the strength of the interpretative obligation under section 3(1). The first is *R v A (No. 2)* [2002] 1 AC 45 which concerned the so-called rape shield legislation. The problem was the blanket exclusion of prior sexual history between the complainant and an accused in section 41(1) of the Youth Justice and Criminal Evidence Act 1999, subject to narrow specific categories in the remainder of section 41. In subsequent decisions, and in academic literature, there has been discussion about differences of emphasis in the various opinions in *A*. What has been largely overlooked is the unanimous conclusion of the House. The

House unanimously agreed on an interpretation under section 3 which would ensure that section 41 would be compatible with the ECHR. The formulation was by agreement set out in paragraph 46 of my opinion in that case as follows:

> "The effect of the decision today is that under section 41(3)(c) of the 1999 Act, construed where necessary by applying the interpretive obligation under section 3 of the Human Rights Act 1998, and due regard always being paid to the importance of seeking to protect the complainant from indignity and from humiliating questions, the test of admissibility is whether the evidence (and questioning in relation to it) is nevertheless so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under article 6 of the Convention. If this test is satisfied the evidence should not be excluded."

This formulation was endorsed by Lord Slynn of Hadley at p 56, para 13 of his opinion in identical wording. The other Law Lords sitting in the case expressly approved the formulation set out in para 46 of my opinion: Lord Hope of Craighead, at pp 87-88, para 110, Lord Clyde, at p 98, para 140; and Lord Hutton, at p 106, para 163. In so ruling the House rejected linguistic arguments in favour of a broader approach. In the subsequent decisions of the House in *In re S (Minors) (Care Order: Implementation of Case Plan)* [2002] 2 AC 291 and *Bellinger v Bellinger* [2003] 2 AC 467, which touched on the remedial structure of the 1998 Act, the decision of the House in the case of *A* was not questioned. And in the present case nobody suggested that *A* involved a heterodox exercise of the power under section 3.

48. The second and third decisions of the House are *Pickstone v Freemans plc* [1989] AC 66 and *Litster v Forth Dry Dock & Engineering Co Ltd* [1990] 1 AC 546 which involve the interpretative obligation under EEC law. *Pickstone* concerned section 1(2) of the Equal Pay Act 1970, (as amended by section 8 of the Sex Discrimination Act 1975 and regulation 2 of the Equal Pay (Amendment) Regulations 1983 (SI 1983/1794)) which implied into any contract without an equality clause one that modifies any term in a woman's contract which is less favourable than a term of a similar kind in the contract of a man:

> "(a) where the woman is employed on like work with a man in the same employment …
>
> (b) where the woman is employed on work rated as equivalent with that of a man in the same employment . . .
>
> (c) where a woman is employed on work which, not being work in relation to which paragraph (a) or (b) above applies, is, in terms of the demands made on her (for instance under such headings as effort, skill and decision), of equal value to that of a man in the same employment".

Lord Templeman observed (at pp 120-121):

> "In my opinion there must be implied in paragraph (c) after the word 'applies' the words 'as between the woman and the man with

whom she claims equality.' This construction is consistent with Community law. The employers' construction is inconsistent with Community law and creates a permitted form of discrimination without rhyme or reason."

That was the *ratio decidendi* of the decision. *Litster* concerned regulations intended to implement an EC Directive, the purpose of which was to protect the workers in an undertaking when its ownership was transferred. However, the regulations only protected those who were employed "immediately before" the transfer. Having enquired into the purpose of the Directive, the House of Lords interpreted the Regulations by reading in additional words to protect workers not only if they were employed "immediately before" the time of transfer, but also when they would have been so employed if they had not been unfairly dismissed by reason of the transfer: see Lord Keith of Kinkel, at 554. In both cases the House eschewed linguistic arguments in favour of a broad approach. *Picksone* and *Litster* involved national legislation which implemented EC Directives. *Marleasing* extended the scope of the interpretative obligation to unimplemented Directives. *Pickstone* and *Litster* reinforce the approach to section 3(1) which prevailed in the House in the rape shield case.

49. A study of the case law listed in the Appendix to this judgment reveals that there has sometimes been a tendency to approach the interpretative task under section 3(1) in too literal and technical a way. In practice there has been too much emphasis on linguistic features. If the core remedial purpose of section 3(1) is not to be undermined a broader approach is required. That is, of course, not to gainsay the obvious proposition that inherent in the use of the word "possible" in section 3(1) is the idea that there is a Rubicon which courts may not cross. If it is not possible, within the meaning of section 3, to read or give effect to legislation in a way which is compatible with Convention rights, the only alternative is to exercise, where appropriate, the power to make a declaration of incompatibility. Usually, such cases should not be too difficult to identify. An obvious example is *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837. The House held that the Home Secretary was not competent under article 6 of the ECHR to decide on the tariff to be served by mandatory life sentence prisoners. The House found a section 3(1) interpretation not "possible" and made a declaration under section 4. Interpretation could not provide a substitute scheme. *Bellinger* is another obvious example. As Lord Rodger of Earlsferry observed ". . . in relation to the validity of marriage, Parliament regards gender as fixed and immutable": [2003] 2 WLR 1174, 1195, para 83. Section 3(1) of the 1998 Act could not be used.

50. Having had the opportunity to reconsider the matter in some depth, I am not disposed to try to formulate precise rules about where section 3 may not be used. Like the proverbial elephant such a case ought generally to be easily identifiable. What is necessary, however, is to emphasise that interpretation under section 3(1) is the prime remedial remedy and that resort to section 4 must always be an exceptional course. In practical effect there is a strong rebuttable presumption in

> favour of an interpretation consistent with Convention rights. Perhaps the opinions delivered in the House today will serve to ensure a balanced approach along such lines.

135. Therefore when interpreting s100B(2) in relation to the Tribunal's powers in relation to CIS penalties, the provision must be interpreted (so far as is possible in the s3 HRA sense) to ensure that the scheme of CIS penalties is proportionate and does not infringe the taxpayer's rights under art 1/1. As we consider that the absence of any power of mitigation is the prime mischief in this case, we consider that "incorrect" in subsection 2(b)(iii) should be read to include penalties which are incorrect by virtue of being disproportionate and breaching the taxpayer's rights under art 1/1.

136. In taking this approach we disagree with the Special Commissioner in *Bysermaw*, and agree with the Special Commissioner in *Auntie's Café* (although for somewhat different reasons).

137. HMRC submits that there is no rational way for the £100 penalties to be mitigated in a case such as this: each £100 penalty is distinct from the next; they do not stand or fall together. The reason that the cumulative total of the £100 penalties is so high is because of Mr Bosher's continued defaults. In the event that the Tribunal were to discharge some of the individual £100 penalties on the grounds of disproportionality, it would in effect be sanctioning Mr Bosher's continued and repeated defaults with the effect that a cap would be placed on the fixed penalties at issue in a way that the legislation itself does not contemplate.

138. We consider that the fixed penalties operate so harshly in this case that they should all be reduced to zero. We consider that any other approach is fraught with difficulties. By reducing these penalties to zero, we do not condone Mr Bosher's repeated defaults, as he will continue to be liable to the month 13 penalties, which (subject to the adjustments we make subsequently in this decision) we consider to represent a proportionate sanction for his failure to file CIS returns in the particular circumstances of this case.

139. As regards the month 13 penalties, we consider that the amounts levied by HMRC are excessive, and we therefore have decided to reduce them pursuant to s100B(3) to an amount equal to the greater of £100 or the CIS tax (if any) shown as payable in respect of the relevant return. We calculate this to be £6287.25.

140. We also gave consideration as to whether a declaration of incompatibility under s4 HRA 1998 was appropriate. However, we note Lord Steyn's comments in *Ghaidan* (at para 50) that

> interpretation under section 3(1) is the prime remedial remedy and that resort to section 4 must always be an exceptional course.

141. As have been able to interpret s100B in a manner which gives a Convention-compatible result, we have not had to consider further declarations of incompatibility. In any event, the First-tier Tribunal is not a "court" as defined by s4(5) HRA 1998, and therefore has no power to issue such a declaration. We had considered whether

the Upper Tribunal might be able to issue such a declaration given that it is a superior court of record (s3(5) Tribunals, Courts and Enforcement Act 2007) and has many of the powers, privileges and authority of the High Court (s25 Tribunals, Courts and Enforcement Act 2007). This point was considered by the Employment Appeals Tribunal (which has corresponding standing to the Upper Tribunal in relation to employment appeals) in *Whittaker v. Watson (t/a P & M Watson Haulage) & Anor* [2002] ICR 1244. In its decision, Lindsay J determined that the EAT was not a "court" for the purposes of s4 HRA 1998, and had no power to make a declaration. The legislation governing the powers of the EAT in s29 Employment Tribunals Act 1996 is expressed in very similar terms to the provisions governing the Upper Tribunal. We therefore have concluded that even if a declaration were to be an appropriate remedy, there would be no point transferring this appeal to the Upper Tribunal, as the Upper Tribunal could not make one.

**Conclusions**

142. Our conclusions are as follows:

(1) that Mr Bosher failed to file the eighteen CIS monthly returns which are subject to this appeal within the relevant time limits;

(2) that Mr Bosher does not have a reasonable excuse for his defaults;

(3) that HMRC properly issued the penalty notices which are the subject of this appeal;

(4) that the monthly fixed penalties are disproportionate for the purposes of art 1/1 and are therefore "incorrect"; and

(5) that the month 13 penalties are excessive.

143. We have therefore decided to reduce each of the fixed monthly penalties to zero and reduce each of the month 13 penalties to the greater of £100 and the amount of CIS tax shown on the return. The total amount of penalties therefore payable is £6287.25.

144. 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.

**NICHOLAS ALEKSANDER**
**TRIBUNAL JUDGE**

**RELEASE DATE: 8 October 2012**

Cases referred to in skeleton arguments but not mentioned in this decision:
*Doherty v Birmingham City Council* [2008] UKHL 57
*HMRC v Khawaja* [2009] 1 WLR 398
*Flaxmode v HMRC* [2010] SFTD 498
*Richard King v HMRC* [2010] UKFTT 79 (TC)
*Harry Gibson v HMRC* [2011] UKFTT 113 (TC)
*Prince v HMRC* [2012] UKFTT 157
*First in Service Ltd v HMRC* [2012] UKFTT 250 (TC)

# Appendix
## 2007 Scheme Returns and Penalties

| Month ended | Filing Date | Date Received | No. of Sub-contractors engaged | Months outstanding for penalties | Total fixed penalties | Month 13 penalty | Total HMRC penalties for return | CIS Deductions on return | Tribunal's penalty determination |
|---|---|---|---|---|---|---|---|---|---|
| 05-May-07 | 19-May-07 | 19-May-07 | 3 | 0 | £0 | £0 | £0 | £878.40 | |
| 05-Jun-07 | 19-Jun-07 | 21-Jun-07 | 2 | 1 | £0 | £0 | £0 | £1,255.20 | |
| 05-Jul-07 | 19-Jul-07 | 20-Jul-07 | 2 | 1 | £0 | £0 | £0 | £1,154.00 | |
| 05-Aug-07 | 19-Aug-07 | 15-Aug-07 | 2 | 0 | £0 | £0 | £0 | £726.00 | |
| 05-Sep-07 | 19-Sep-07 | 24-Dec-10 | 0 | 13+ | £1,100 | £300 | £1,400 | £0 | £100.00 |
| 05-Oct-07 | 19-Oct-07 | 12-Jul-10 | 2 | 13+ | £1,200 | £600 | £1,800 | £1,101.00 | £1,101.00 |
| 05-Nov-07 | 19-Nov-07 | 24-Dec-10 | 2 | 13+ | £1,200 | £900 | £2,100 | £756.10 | £756.10 |
| 05-Dec-07 | 19-Dec-07 | 12-Jul-10 | 2 | 13+ | £1,200 | £1,200 | £2,400 | £1,140.40 | £1,140.40 |
| 05-Jan-08 | 19-Jan-08 | 12-Jul-10 | 1 | 13+ | £1,200 | £1,500 | £2,700 | £112.50 | £112.50 |
| 05-Feb-08 | 19-Feb-08 | 12-Jul-10 | 1 | 13+ | £1,200 | £3,000 | £4,200 | £26.00 | £100.00 |
| 05-Mar-08 | 19-Mar-08 | 12-Jul-10 | 1 | 13+ | £1,200 | £3,000 | £4,200 | £608.00 | £608.00 |
| 05-Apr-08 | 19-Apr-08 | 28-Jun-10 | 0 | 13+ | £1,200 | £3,000 | £4,200 | £0 | £100.00 |
| 05-May-08 | 19-May-08 | 19-May-08 | 1 | 0 | £0 | £0 | £0 | £800.00 | £0 |
| 05-Jun-08 | 19-Jun-08 | 28-Jun-10 | 0 | 13+ | £1,200 | £3,000 | £4,200 | £0 | £100.00 |
| 05-Jul-08 | 19-Jul-08 | 08-Jul-08 | 0 | 0 | £0 | £0 | £0 | £0 | £0 |
| 05-Aug-08 | 19-Aug-08 | 28-Jun-10 | 0 | 13+ | £1,200 | £300 | £1,500 | £0 | £100 |
| 05-Sep-08 | 19-Sep-08 | 25-Sep-08 | 0 | 1 | £100 | £0 | £100 | £0 | £0 |
| 05-Oct-08 | 19-Oct-08 | 15-Oct-08 | 0 | 0 | £0 | £0 | £0 | £0 | £0 |
| 05-Nov-08 | 19-Nov-08 | 27-Nov-08 | 0 | 1 | £100 | £0 | £100 | £0 | £0 |
| 05-Dec-08 | 19-Dec-08 | 12-Jul-10 | 1 | 13+ | £1,200 | £3,000 | £4,200 | £161.25 | £161.25 |
| 05-Jan-09 | 19-Jan-09 | 12-Jul-10 | 1 | 13+ | £1,200 | £3,000 | £4,200 | £288.00 | £288.00 |
| 05-Feb-09 | 19-Feb-09 | 12-Jul-10 | 1 | 13+ | £1,200 | £3,000 | £4,200 | £144.00 | £144.00 |
| 05-Mar-09 | 19-Mar-09 | 12-Jul-10 | 1 | 13+ | £1,200 | £3,000 | £4,200 | £234.00 | £234.00 |
| 05-Apr-09 | 19-Apr-09 | 12-Jul-10 | 1 | 13+ | £1,200 | £3,000 | £4,200 | £720.00 | £720.00 |
| 05-May-09 | 19-May-09 | 24-Dec-10 | 1 | 13+ | £1,200 | £3,000 | £4,200 | £522.00 | £522.00 |
| 05-Jun-09 | 19-Jun-09 | 28-Jun-10 | 0 | 13+ | £1,200 | £3,000 | *£0* | £0 | |
| 05-Jul-09 | 19-Jul-09 | 28-Jun-10 | 0 | 12 | £1,200 | £0 | *£0* | £0 | |
| 05-Aug-09 | 19-Aug-09 | 28-Jun-10 | 0 | 11 | £1,100 | £0 | *£0* | £0 | |
| 05-Sep-09 | 19-Sep-09 | 28-Jun-10 | 0 | 10 | £1,000 | £0 | *£0* | £0 | |
| 05-Oct-09 | 19-Oct-09 | 28-Jun-10 | 0 | 9 | £900 | £0 | *£0* | £0 | |
| 05-Nov-09 | 19-Nov-09 | 28-Jun-10 | 0 | 8 | £800 | £0 | *£0* | £0 | |
| 05-Dec-09 | 19-Dec-09 | 28-Jun-10 | 0 | 7 | £700 | £0 | *£0* | £0 | |
| 05-Jan-10 | 19-Jan-10 | 13-Jan-10 | 0 | 0 | £0 | £0 | *£0* | £0 | |
| 05-Feb-10 | 19-Feb-10 | 17-Mar-10 | 0 | 1 | £100 | £0 | *£0* | £0 | |
| 05-Mar-10 | 19-Mar-10 | 17-Mar-10 | 0 | 0 | £0 | £0 | *£0* | £0 | |
| 05-Apr-10 | 19-Apr-10 | 28-Jun-10 | 0 | 3 | £300 | £0 | *£0* | £0 | |
| 05-May-10 | 19-May-10 | 07-May-10 | 0 | 0 | £0 | £0 | *£0* | £0 | |
| 05-Dec-10 | 19-Dec-10 | 24-Dec-10 | 0 | 1 | £0 | £0 | *£0* | £0 | |
| **TOTALS** | | | | | **£26,600** | **£37,800** | **£54,100** | **£5,812.25** | **£6,287.25** |

Penalties in *italics* determined by HMRC in favour of the Mr Bosher (because he ceased to engage subcontractors from the month ended 05/05/2009)