[2014] UKFTT 0759 (TC)

TC03879

Appeal number TC/2012/10884

CONSTRUCTION INDUSTRY SCHEME –penalties under Schedule 24 Finance Act 2007 of £41.13 – penalty under Section 98A (4) Taxes Management Act 1970 £140 and £7200 – failure to make scheme returns – incorrect assessment raised -appellant had reasonable excuse and penalty not proportional - appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appellant

GARY LAITHWAITE

- and -

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

TRIBUNAL: JUDGE DAVID S PORTER
MR PHILIP JOLLY

Sitting in public at Alexandra House, Manchester on 27 June 2014

Mr Con Kelly, a tax adviser, for the Appellant

Mr Tony O'Grady, a presenting officer, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents.

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DECISION

1. Mr Gary Laithwaite (Mr Laithwaite) appeals against three penalties. The first issued on 3 October 2012 for £41.13 the second and third issued on 8 October 2012 for £140 and £7,200 respectively. Mr Laithwaite is a small jobbing builder, who needed assistance with some of his building work. He contacted his accountants who advised that he should register for the Construction Industry Scheme in respect of his first labour only contractor. He then employed substantial sub-contractors all of whom had certificates confirming that Mr Laithwaite need not deduct tax. He had failed to provide monthly returns even though no tax was due, which gave rise to the penalties. He said that he had a reasonable excuse because he had acted on his accountant's advice. The Respondents (HMRC) said that adequate generic notices about the scheme had been sent to Mr Laithwaite and that he should have known that he needed to make the returns. He did not have a reasonable excuse for not doing so. The penalties should be upheld.

2. Mr Tony O'Grady (Mr O'Grady), a presenting officer, appeared for HMRC and produced a bundle for the Tribunal and a skeleton argument. Mr Con Kelly (Mr Kelly), a tax adviser, appeared for Mr Laithwaite. He produced a skeleton argument and called Mr Laithwaite, who gave evidence under oath and Mr Gabriel Kavanagh (Mr Kavanagh) from Calculus Accountants & Co, Manchester, Mr Laithwiate's former accountant, who affirmed.

3. We were referred to the following cases:

(a) *Blyth v The Company of Proprietors of the Birmingham Water Works* [1856] EWHC Exch J65.

(b) *P D F Electrical Limited* [2012] UKFTT 708.

(c) *The Commissioners for Her Majesty's Revenue and Customs v Hok Limited* [2012] UKUT 363 (TCC).

(d) *The Commissioners for Her Majesty's Revenue and Customs v Total Technology (Engineering) Limited* [2012] UKUT 418 (TCC)

(e) *Revenue and Customs Commissioners v Bosher* [2013] UKUT 0579 (TCC).

The law

4. The Construction Industry Scheme ("CIS") provides for payments by contractors to sub-contractors in the construction industry to be subject to the deduction of the amounts on account of the sub-contractor's tax. Section 61 Finance Act 2004 imposes an obligation to deduct on contractors. Returns, showing the tax or nil depending on the circumstance, have to be made up to the 6th of each month and submitted to HMRC by 19th of each month. The Scheme was introduced because a substantial number of sub-contractors were paid 'cash in hand' and 'disappeared' resulting in a significant loss of revenue. It is for that reason that the returns require all the details of the sub-contractor, even if there is a 'nil' return.

5. Regulation 9 of the Income Tax (Construction Industry Scheme) Regulations 2005 (the Regulations) applies if an officer of Revenue and Customs decides that the amount which the contractor should have deducted exceeds the amount the contractor actually deducted and either of the two following conditions apply:

5 A . The contractor satisfies the officer that he took reasonable care to comply with section 61 and the regulations and the failure to deduct

(i) was due to an error made in good faith

(ii) and the contractor held a genuine belief that section 61 of the Act did not apply to the payment.

10 B. The officer is satisfied that sub-contractor

(i) was not chargeable to income tax or corporation tax in respect of those payments, or

(ii) has made a return in his income or profits in accordance with section 8 of the Taxes Management Act 1970 or paragraph 3 of Schedule 18 to 15 the Finance Act 1998, in which those payments were taken into account, and paid the income tax and class 4 contributions or corporation tax due

(iii) and the contractor requests the Commissioners make a direction under paragraph 5.

(5) An officer may direct that the contractor is not liable to pay the excess….

20 (6) If condition A is not met an officer may refuse to make a direction stating why and the date the refusal notice was issued.

(7) A contractor may appeal by a notice to the officer within 30 days of the refusal specifying the grounds of the appeal.

(8) For the purposes of paragraph 7, the contractor must show that he took 25 reasonable care to comply with section 61 and the failure to deduct the tax was due to an error made in good faith, or the contractor had a genuine belief that section 61 did not apply to the payment.

(9) On appeal under paragraph (7) the Tribunal may direct that an officer makes a direction under paragraph (5) in an amount that the tribunal determines is the 30 excess for one or more tax periods falling within the relevant year.

(10) If the contractor has deducted the appropriate tax but not paid it to HMRC it is to be treated for determining the liability of any sub-contractor as having been paid at the time required by the Regulations.

6. Under section 98A (2) of the Taxes Management Act 1970 (The Act), if a monthly return is received after the filing date (19th of each month) it will be treated as late and the contractor will be liable to a penalty of £100 for each month he is late in the first 12 months. For each month thereafter a similar penalty for £100 arises, but no more than £1200 can be incurred in the second year, provided that there are less than 50 sub-contractors, as in this case. If the failure continues into the third year then the 13 month penalty cannot exceed £3000. Consequently, the total exposure to a penalty for any one return is a maximum of £4,200

7. HMRC's policy in calculating the month 13 penalty is to charge at an increased tariff based on the number of instances a return is over twelve months late in a rolling twelve month period. The first failure is charged at £3000, the second at £600, the third at £900, the fourth at £1200, the fifth at £1500 and the sixth and subsequent failures charged at £3000.

8. Under section 98A (4) of the Act :

> "..where this section applies in relation to a provision of the regulations, any person who fraudulently or negligently makes an incorrect return of a kind mentioned in the provision shall be liable to a penalty not exceeding the difference between the amount payable by him in accordance with the regulations under sections 70 (1)(a) or 71 of the Finance Act 2004, to which the returns relates, and the amount which would have been so payable if the return had been correct."

9. Under section 24 Finance Act 2007, Part 1 paragraph 1, a penalty is payable by a person (P) who gives HMRC a document of a kind listed in the table (which covers these tax liabilities) and conditions 1 and 2 are satisfied:

> Condition 1 is that the document contains an inaccuracy which amounts to or leads to an understatement of liability to tax.
>
> Condition 2 is that the inaccuracy was careless or deliberate on P's part. In this context an inaccuracy is careless if it is due to a failure by P to take reasonable care.
>
> The standard penalty for carelessness is 30% of the potential lost revenue being the additional amount of tax due arising from the correction of the inaccuracy. If the disclosure by P arises from HMRC prompting him of the failure the penalty is reduced to not less than 15%. If the disclosure is unprompted the penalty may be reduced to Nil. The amount of the reduction depends on the quality of the disclosure by P arising from what he tells HMRC; how much assistance he gives in discovering the truth; and whether he give access to the appropriate information.

10. Section 118 (2) the Act provides:

> "For the purposes of this Act, a person shall be deemed not to have failed to do anything required to be done within a time limit if he did it within such further

time, if any, as the Board or the Tribunal or officer concerned may have allowed: and where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it if he did it without unreasonable delay after such excuse had ceased.

5 11. Section 100B of the Act is headed "Appeals against penalty determinations" and sets out the relevant right of appeal and the extent of the Tribunal's jurisdiction. It provides as far as is material:

"the First-tribunal may-

(a) In the case of a penalty which is required to be of a particular amount:

10 (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
15 reduce it to the correct amount,

(b) In the case of any other penalty;

(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
20 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
25 appropriate.

12. Under section 102 of the Act, HMRC has a specific power to mitigate penalties. The section provides:

"The Board may at their discretion mitigate any penalty, or stay or compound any proceedings for a penalty, and may also, after judgment, further mitigate
30 or entirely remit the penalty

HMRC have a published policy on how it operates its mitigation powers. It can be found in HMRC's online Enquiry Manual at EM5310-Penalties. It is of more general application, and some of its provisions are not relevant to the CIS regime. Mitigation will be considered after:

i. The penalty has been determined and the taxpayer has exhausted (or abandoned) all appeal rights and/or

ii. The failure or error that led to the penalty has been remedied or corrected.

Mitigation will then be considered in three circumstances:

5 (i) When some sort of HMRC maladministration, usually delay, has caused or contributed to the size of the penalty – where delay and/or lack of co-operation by the taxpayer have caused the department additional costs that will be weighed against mitigation.

(ii) Where to enforce payment of the penalty would cause the taxpayer 10 genuine and absolute hardship.

(iii) Other exceptional circumstances such as the penalty or penalties being wholly disproportionate to the offence, the example being of a large tax-geared failure penalty under section 93 (5) following upon very large section 93 (£) daily penalties for the same offence, or belated 15 information revealing the type of situation set out at EM5212 ("In-built 'penalty).

The Facts

13. Mr Laithwaite is a small jobbing builder, and he told us, under oath, that his turnover was around £70,000 and his net profits are between £17,000 and £25,000. He 20 had been in the business for over 25 years, and had been involved in domestic contracting, fitting kitchens, bathrooms and some building work for re-furbishing and extensions. He had been operating the Construction Industry Scheme (CIS) satisfactorily during that period. The business had expanded and he needed some additional help. Steve Baybutt had helped him out in the past and he asked him if he 25 would work for him on a labour only basis as a sub-contractor.

14. Mr Baybutt agreed and Mr Laithwaite telephoned his accountants, Calculus Accountants & Co (Calculus) owned by Mr Kavanagh, and spoke to Cath the lady who dealt with the PAYE returns for his business. She advised that he needed to register for the purposes of the CIS scheme. He had explained to her that Mr Baybutt 30 was working on a labour only basis. He was advised that he still had to register. He registered accordingly and made the appropriate returns.

15. Mr Laithwaite told us that he had several friends in the building industry and that he had decided to ask then to help him out. Unlike Mr Baybutt, however, they were able to supply materials as well as labour. If, for example, he was contracted to put in a 35 new kitchen, he would ask one of his contacts to carry out the work for him .That sub-contractor would source the kitchen and install it. All the contractors he dealt with appeared to have tax certificates and they advised him that he had no need to deduct any tax from his sub-contractor payments, as they would pay the tax. On that basis he believed that as those sub-contractors were providing materials, as well as labour, the 40 new CIS did not apply and he did not need to make any returns. The accountants had not

advised that if there were materials involved he still needed to make the returns under the scheme.

16. In a letter of 14 November 2011 from Calculus Mr Kavanagh stated

> "I write in reply to your letter, dated 31 October 2011, requesting comments on 'why Mr Laithwaite did not seek to verify the sub-contractors'. Before I make such comments, you need be aware that, whilst Calculus may be authorised by Mr Laithwaite to act in the capacity of tax agents, Mr Laithwaite retained responsibility for operating and complying with the CIS Scheme, over which we had no oversight or input.
>
> 1. Thus, Mr Laithwaite did not access professional support or advice in the area of CIS. Apparently he took advice from fellow tradesmen, which may go some way towards explaining where he went wrong….."

and at paragraph 5 he said

> 5. When we prepared Mr Laithwiate's 2008/9 annual accounts and found there were gross payments by sub-contractors, we reminded Mr Laithwiate of how the CIS Scheme was intended to operate….

This comment is hardly consistent with the suggestion that Calculus had no involvement with Mr Laithwiate's operation of the CIS scheme.

17. Mr Kavanagh gave evidence and affirmed. He repeated that Calculus was not instructed to deal with Mr Laithwaite's CIS returns. We had the distinct impression that this was said to assist Mr Kavanagh in the event that Mr Laithwiate might chose to sue his company for incorrect advice. We found Mr Kavanagh's evidence singularly unhelpful and we did not believe that part of his evidence which dealt with Mr Laithwaite's failure to comply with the scheme. Mr Kavanagh has confirmed, in writing, that Calculus, in completing the annual tax returns, was aware of all the sub-contractors. As a result, in the past it would, have completed the necessary reconciliation as to tax paid or deducted under the earlier scheme and advised Mr Laithwaite accordingly.

18. By way of contrast, we found Mr Laithwaite's evidence to be truthful and straight forward. He confirmed that he had received the generic details from HMRC but as these had been voluminous he had not read them in detail but had decided to consult his accountants. We have no doubt from the way that he told us, that he genuinely believed that he had complied with the terms of the scheme and that he had been properly advised by Cath. He had no reason to suppose that her advice was incorrect.

19. Correspondence passed between Calculus and HMRC with regard to those sub-contractors who had paid the appropriate tax. In a letter dated 16 April 2012 Ms Cooper-Grout has allowed Mr Laithwaite not to pay the tax amounting to £1,936.46 in relation to ;

a. Mr V Fox t/a Greenhalgh & Duxbury Electrical
b. D J B Plumbing and heating
c. Aeon Electral LLP
d. Byrom Plumbing and Heating

5 On the basis that HMRC had applied the concession under Regulation (9).

20. In a letter of 25 April 2012 Mr Lobban explained that although HMRC had made the earlier allowances there remained penalties for incorrect returns up to 5 March 2009. The other penalties related to inaccuracies in returns where the due date for filing was on 10 or after 1 April 2009. A penalty was due under section 98A which provided for a penalty for fraudulently or negligently submitting in correct returns for :

5 October 2008	under deducted by £200
5 November 2008	under deducted by £51.95
5 January 2009	under deducted by £353.04
5 March 2009	under deducted by £95.00

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These returns were considered to be incorrect because they were under declared by the above amounts. The maximum penalty before abatements was £699.99, but following 20 disclosure were reduced by a percentage of 80% to a charge of £140.

21. In the same letter Mr Lobban indicated there were late returns for the following periods:

25

5 November 2009	under deducted by £194.20
5 June 2010	under deducted by £80.

The penalty was due under Schedule 24 Finance Act 2007n as the returns were filed as nil. Mr Lobban had accepted Mr Laithwaite's misguided understanding of the 30 scheme as careless behaviour. A reduction was due for the quality of Mr Laithwaite's disclosure and he had allowed:

Telling due to misunderstanding	30%
Helping a full reduction had been made of	40%
Giving all request for information had been provided on time	<u>30%</u>
Total	100%

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Because he had prompted the disclosure and the maximum reductions had been given he had used the lowest percentage of 15% for the tax due of £274.20 to give a penalty of 40 £41.

22. As the failure had continued beyond 12 months, section 98a (2) (b) provided for a further penalty not exceeding £3000. The penalty was calculated on an increasing tariff basis according to the number of offences within the 12 month period. As there were 8 45 periods from 5 June 2009 to 5 September 2010 the penalty amounted to £21,600. HMRC considered that penalty to be excessive and confirmed that it could mitigate the penalty

under section 102 of the Act to an amount calculated under Schedule 55 Finance Act 2009, which reduced the penalty to £7,200. The total proposed penalties were £7,381.

Mr Kelly's Submissions

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23. Mr Kelly submitted that HMRC should have agreed to the returns under regulation 9 Condition A. Mr Laithwaite had taken reasonable care to comply with section 61 and the regulations and the failure to deduct was due to an error made in good faith and he held a genuine belief that section 61 of the Act did not apply to the
10 payment. As a result, the penalties should be set aside. The onus of proof is on HMRC based on the balance of probabilities. Mr Kelly submitted that Mr Laithwaite had a reasonable excuse in any event as he had properly relied on the advice of Cath and the ongoing oversight of his affairs by Mr Kavanagh and all the penalties should be set aside

15 24. In the notice of appeal at paragraph (3) of the grounds for appeal, Mr Kavanagh appealed on the basis that:

(2) The penalty of £7,381 is out of proportion to the tax to be collected and the 'offence'.

Mr Kelly has not addressed us with regard to that ground but we have dealt with it in
20 our decision at paragraph 38.

Mr Justice Warren has confirmed, in *Bosher*, that the Tribunal can consider the question of whether Article 1 of the First Protocol to the Convention Rights had been infringed, as to proportionality, on an individual basis as he and Judge Bishopp had decided in *HMRC v Total Technology (Engineering) Limited* [2012] UKUT
25 418(TCC).

25. Mr Kelly further submitted that as the penalty of £7,200 appeared to have been assessed under section 98(A) (2) of the Act it was incorrect. This amount represented the mitigation that HMRC would have given if this Tribunal found that the penalty of £21,600 was excessive. The calculation of £7,200 arises since the
30 introduction of the new penalty regime under section 55 of the Finance Act 2009**.** He submitted that there was no basis for this calculation because the governing legislation was section 98 A (2) (a) and (b**).** In a letter of 25 April 2012 from Local Compliance, Small & Medium Enterprise CIS Functional Lead Team signed by Mr Lobban stated :

35 "The total amount of penalties due under Section 98A (2) is £21,600 these penalties have proved to be excessive and the only provision for HMRC to reduce or mitigate penalties is section 102 TMA 1970 to an amount under Schedule 55 Finance Act 2009. Under this process I am authorised to reduce the total amount to £7,200 …In summary the penalty to charge is £7,381 I require
40 your agreement to pay this amount. If you agree I will ask you to settle the compliance check with a contract settlement and a letter of offer will be issued for your signature."

Mr Laithwaite did not agree to settle on this basis.

26. In her letter of 16 August 2012 from the same Lead Team, Gill Cooper-Grout an HMRC officer compounded the error when she stated:

5 "With reference to the quantum of the penalty sought, as you are aware, the bulk of this (£7,200) relates to fixed penalties due under Section 98 A (2) for late returns. The penalties that were strictly due under the legislation amount to £21,600 but we are able to use the provisions within s102 TMA 1970 to reduce them to the level that would have been chargeable under Schedule 55 Finance
10 Act 2005. There is no provision within this Act to allow for further reduction..."

Both Mr Lobban and Ms Cooper-Grout operated out of a specialist unit and therefore should have known the proper procedure. Mr Kelly submitted that this was not a minor matter as a penalty determination made on the wrong basis was fundamentally incorrect. In the circumstances the penalty should be reduced to nil.

15
- HMRC had not lost any tax.
- Mr Laithwaite had taken reasonable care in obtaining professional advice for his accountant, which gave rise to a reasonable excuse.
- The penalty of £7,200 was invalid because it had been raised incorrectly.
- The penalty of £7,200 was not proportionate.

20 As a result the penalties should be set aside and the appeal allowed.

Mr O'Grady's submissions.

27. Mr O'Grady submitted that Mr Laithwaite had agreed that he had seen the generic information provided by HMRC. The legislation makes it abundantly clear that Mr Laithwaite should have properly verified the status of those subcontractors to
25 whom payment were made i.e. gross payment or net, and if net, the rate of payment. The legislation also makes it clear that all payments made to sub –contractors, whether gross or net, should be included on the monthly returns. Extensive guidance is given on HMRC's website in the form of CIS340. Pages 20 and 31 thereof confirms that all payments to sub-contractors should be properly verified and should be
30 included in the monthly returns.

28. Mr Laithwaite has been operating the CIS scheme for 13 years. Given his experience and length of time in the industry, HMRC fails to understand how anyone operating under the CIS scheme could be unaware of its requirements. Consequently HMRC believed that Mr Laithwaite was negligent/careless, because he simply did not
35 take the trouble to familiarise himself with the requirements of the CIS scheme.

29. For the efficient administration of the CIS scheme, it is imperative that contractors make full and accurate returns in respect of all payments to sub-contractors, if they do not then the scheme is of no value.

30. Mr O'Grady also took exception to the fact that Mr Kelly had only raised his concerns about the legitimacy of the penalty of £7,200 at the hearing. He submitted that as the reference to the correct section appeared in the penalty notice and the reduction to £7,200 was what the result would be if the appeal was dismissed, no hardship had been caused to Mr Laithwaite .

The decision

31. We have considered the law and the evidence and we have decided that Mr Laithwaite had a reasonable excuse, under section 118 of the Act, for his failures to make the appropriate returns. We found his evidence to be truthful and we are satisfied that he genuinely believed that he was operating the scheme correctly as a result of the initial advice given by Cath from Calculus. Mr Kavagnan was unconvincing and his correspondence clearly demonstrated that his firm knew about the CIS scheme and, therefore, must have known of Cath's advice. As a result, Mr Laithwaite was entitled to rely on the ongoing advice from the accountants, who appear not to have considered that the way in which Mr Laithwaite was dealing with the scheme was incorrect. Having decided that Mr Laithwaite had a reasonable excuse, the penalties are set aside

32. On that basis we have also decided, that HMRC should have applied Condition A of the Regulations as Mr Laithwaite could have satisfied the officer that he had taken reasonable care, and that the error had been made in good faith and that he genuinely believed that he had complied with section 61. In those circumstances we would have directed that Mr Labbon reduce the amount of the excess to nil.

33. We have, however, been addressed by Mr Kelly with regard to the correctness or otherwise of the penalty for £7,200. And, if we are wrong with regard to the reasonable excuse, we have found that the penalty of £7,200 has been incorrectly raised.

34. We have been referred to the case of *Bosher*, a case heard in the Upper Tribunal by Mr Justice Warren and Judge Colin Bishopp. At paragraphs 14 and 15 they observed:

> "14. ….. Schedule 55 of the Finance Act 2009 introduced a new penalty regime for the late filing of a return (including 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 fact that the new CIS penalty regime would shortly come into force, HMRC introduced a revised policy for the mitigation of penalties under section 102 of TMA for late contractors' monthly returns. This policy was announced on HMRC's website. HMRC compared the penalties charged under section 98 A of TMA with the amounts that would be charged under Schedule 55. If the penalties under the new regime were less, HMRC offered to mitigate the 98A penalties to the lower amount, using their discretion under s102 of the Act.

15. HMRC's new policy results in one of the following three outcomes:

> (1) If a contractor accepts the lower penalty amount, the penalties are reduced under section 102 of TMA.
>
> (2) If the contractor wishes to challenge the fact that a penalty is due despite the offer of mitigation, he can appeal in the normal way. However, HMRC will not reduce the amount beforehand. If the tribunal determines that penalty at the higher figure once the appeal process has been exhausted, HMRC will reduce the amount of the penalty under section 102 of the Act in the any event. If the contractor feels that further mitigation is due for reasons such as hardship, this will be considered in the normal way.
>
> (3). If a contractor agrees that a penalty is due but feels that it should be mitigated further, his reasons will be considered in the normal way.

35. We accept that the notice for the penalty of £7,200 referred to the correct section but the incorrect amount. The notice should have referred to the penalty assessed under section 98 A of £21,600. Both we and the parties appreciate that the notice should have referred to £21,600 and both parties accept that if HMRC are to exercise their powers of mitigation the overall penalty will be reduced to £7,381.

36. Mr Justice Warren in the *Bosher* case at paragraphs 36 and 37 said:

> "36 …. Suppose, for example, that the legislation expressly conferred a right of appeal to the First-tier Tribunal in relation to the amount of the mitigation allowed by HMRC. We do not think that it could be sensibly argued that that was an insufficient method by which to vindicate a taxpayers Convention Rights. And that is so even in light of the current policy to consider mitigation only after an appeal on the correctness or otherwise of the initial penalty. In other words, in that scenario, we would reject any argument that, in order to render the legislation Convention compliant, a right to appeal against the amount of the initial penalty needs to be provided as the only way effectively to vindicate a taxpayers Convention Rights notwithstanding the existence of an express right to appeal the amount of the mitigation.
>
> 37. The legislation does not, of course, in fact provide for such a right of appeal against the amount allowed by way of mitigation. But what English law does provide is right to seek judicial review of the exercise of the power of mitigation. The question, then, is whether that right is a sufficient vindication of a taxpayers Convention Rights."

Mr Justice Warren decided that a judicial review of the mitigated penalty represented an adequate and effective way to protect the taxpayer's rights.

37. It has been suggested that as the full penalty amount of £21,600 is known to all parties it ought to be substituted for the penalty of £7,200. We have decided that we cannot do that as the whole appeal has been based on the figure of £7,200. Mr

Laithwaite had not agreed that figure and HMRC were aware of that fact. As the specialist unit, it behoves HMRC to make sure that it prepares the notices properly. Its policy requires this Tribunal to decide on the correct penalty, after which HMRC would consider mitigation. This tribunal has no jurisdiction to consider the mitigate penalty of £7,200 which is before us to-day, that is matter for the High Court through an application for Judicial Review. In those circumstances we set aside the penalty of £7,200.

38. We have not had any full arguments as to 'proportionality'. In *Bosher*, Mr Justice Warren has confirmed that, as with *Total Technology,* this Tribunal can consider proportionality on an individual basis. The amount of tax concerned is £974.19 (see paragraphs 20 and 21 above). Whilst we have not seen any accounts, we have been told by Mr Laithwaite that his profits are between £17,000 and £25,000 and we have no reason to disbelieve him. In those circumstances, a penalty under section 98 A of £21,600 represents a full year's profits and must, in relation to Mr Laithwaite's business, be disproportionate. Even a mitigated penalty of £7,200 would represent over half his profits and again if we could consider the matter, we would consider that to be disproportionate. In light of Mr Justice Warren's comments in *Bosher,* that would be a matter to be decided by the High Court by way of judicial review and we do not have any jurisdiction to consider the same. Mr Kelly has suggested that a Judicial Review is no remedy for Mr Laithwaite because of the costs involved. Mr Justice Warren has indicated that that is not a reason for the remedy not to be compliant with Mr Laithwaite's Convention Rights.

37. In all the above circumstances we set aside all the penalties and allow the appeal.

38. 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.

DAVID S PORTER
TRIBUNAL JUDGE

RELEASE DATE: 6th August 2014