[2015] UKFTT 0490 (TC)

TC04652

Appeal number: TC/2014/04342

TAX UNDER CH 3 PT 3 FA 2004 (CONSTRUCTION INDUSTRY SCHEME) – penalties under s 98A TMA and Sch 55 FA 2009 for failure to make monthly returns – whether penalties disproportionate – no, following Bosher - whether reasonable excuse – no – whether some assessments out of time – yes.

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR ROBERT WHITTEN **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS
MICHAEL SHARP

Sitting in public at the Royal Courts of Justice, Belfast on 25 August 2015

Mr David Brown of S D Brown & Co, Chartered Certified Accountants for the Appellant

Ms Deborah Williams, Presenting Officer, for the Respondents

DECISION

1. This was an appeal by Mr Robert Whitten ("the appellant") against a determination of penalties under section 98A Taxes Management Act 1970 ("TMA") and assessments of penalties under Schedule 55 Finance Act ("FA") 2009 ("Schedule 55"). The determination and all of the assessments were made as a result of the appellant's failure to submit monthly returns of payments made to subcontractors under the Construction Industry Scheme ("CIS") for the months ending 5 May 2009 to 5 June 2013 inclusive (except for that to 5 May 2012).

2. We have allowed the appeal in part, reducing the penalty which the appellant must pay by £1,300.

Evidence

3. We had a bundle of documents prepared by HMRC and a few other documents put in by the appellant. We also had oral evidence from the appellant.

Law

4. The obligation to make monthly returns is set out in regulation 4 of the Income Tax (Construction Industry Scheme) Regulations 2005 (SI 2005/2045) ("the CIS Regulations") as follows:

> "4 Monthly return
>
> (1) A return must be made to the Commissioners for Her Majesty's Revenue and Customs in a document or format provided or approved by the Commissioners—
>
> (a) not later than 14 days after the end of every tax month, by a contractor making contract payments or payments which would be contract payments but for section 60(4) of the Act (contract payments: exceptions), and
>
> (b) not later than 14 days after the end of the tax month following the appointed day, by a contractor who has made a payment in the 12 months preceding the appointed day which would be a contract payment or a payment which would be a contract payment but for section 60(4) of the Act if made after the appointed day.
>
> (2) The return under paragraph (1) must contain the following information—
>
> (a) the contractor's name,
>
> (b) the contractor's unique taxpayer reference (UTR) and Accounts' Office reference,
>
> (c) the tax month to which the return relates, and

(d) in respect of each sub-contractor to whom, or to whose nominee, payments under construction contracts were made by the contractor during that month,—

(i) the sub-contractor's name;

(ii) the sub-contractor's national insurance number (NINO) or company registration number (CRN), if known; and

(iii) the information specified in paragraph (3).

(3) The information specified is—

(a) if the sub-contractor is registered for gross payment—

(i) the sub-contractor's unique taxpayer reference (UTR), and

(ii) the total amount of payments which would be contract payments but for section 60(4) of the Act (contract payments: exceptions) made by the contractor to the sub-contractor during the tax month;

(b) if the sub-contractor is registered for payment under deduction—

(i) the sub-contractor's unique taxpayer reference (UTR),

(ii) the total amount of contract payments made by the contractor to the sub-contractor during the tax month,

(iii) the total amount included in those payments which the contractor is satisfied represents the direct cost to any person other than the contractor of materials used or to be used in carrying out the construction contract to which the contract payment relates, and

(iv) the total amount deducted from the payments mentioned in paragraph (3)(b)(ii) under section 61 of the Act (deduction on account of tax from contract payments);

(c) if the sub-contractor is not registered for gross payment or payment under deduction—

(i) the sub-contractor's unique taxpayer reference (UTR), if known,

(ii) the total amount of contract payments made by the contractor to the sub-contractor during the tax month,

(iii) the total amount included in those payments which the contractor is satisfied represents the direct cost to any person other than the contractor of materials used or to be used in carrying out the construction contract to which the contract payment relates,

(iv) the total amount deducted from the payments mentioned in paragraph (3)(c)(ii) under section 61 of the Act, and

(v) the verification reference for higher rate deduction.

(4) The return may be transmitted electronically to the Commissioners for Her Majesty's Revenue and Customs.

(5) The return must include a declaration by the person making the return—

(a) that none of the contracts to which the return relates is a contract of employment;

(b) indicating whether he has complied with the requirements of regulation 6 (verification etc of registration status of sub-contractor) in the case of each person to whom a payment to which the return relates is made; and

(c) that the return contains all the information, particulars and supporting information required by this regulation to be included in the return, and such information, particulars and supporting information are complete and accurate to the best of the contractor's knowledge and belief.

(6) If the return is not transmitted electronically, it must be signed by the contractor or a person duly authorised by the contractor to make the return.

(7) The contractor must make and keep such records as will enable him to comply with this regulation.

…

(10) If a contractor who has made a return, or should have made a return, under this regulation makes no payments under construction contracts in the tax month following that return, the contractor must make a nil return not later than 14 days after the end of that tax month.

This is subject to paragraph (11).

(11) Paragraph (10) does not apply if the contractor has notified the Commissioners for Her Majesty's Revenue and Customs that the contractor will make no further payments under construction contracts within the following six months.

(12) Subject to paragraph (13), section 98A of TMA (special penalties in the case of certain returns) applies to the requirements in—

(a) paragraph (1),

(b) paragraph (3)(b),

(c) paragraph (3)(c),

(d) paragraph (10).

(13) A penalty under section 98A of TMA in relation to a failure to make a return in accordance with paragraphs (1) or (10) arises for each month (or part of a month) during which the failure continues after the 19th day of the sixth month following the appointed day, but only arises where that failure relates to a return that must be made not later than 19th October 2011 [*sic*[1]]."

5. Section 98A Taxes Management Act 1970 ("TMA"), as it applies to monthly returns, says:

"Special penalties in the case of certain returns

(1) … regulations under section 70(1)(a) or 71 of the Finance Act 2004 (sub-contractors) may provide that this section shall apply in relation to any specified provision of the regulations.

(2) Where this section applies in relation to a provision of regulations, any person who fails to make a return in accordance with the provision shall be liable—

(a) to a penalty or penalties of the relevant monthly amount for each month (or part of a month) during which the failure continues, but excluding any month after the twelfth or for which a penalty under this paragraph has already been imposed, and

(b) if the failure continues beyond twelve months, without prejudice to any penalty under paragraph (a) above, to a penalty not exceeding—

…

[1] The words in this paragraph after "appointed day" were added by article 3(3) of the Finance Act 2009, Schedule 55 and Sections 101 to 103 (Appointed Day, etc) (Construction Industry Scheme) Order, SI 2011/2391. But they are in the wrong place. The intention of the order was to switch off s 98A TMA in relation to penalties for monthly returns so that Schedule 55 FA 2009 would apply for the return to 5 April November 2011 and subsequent returns. But regulation 4(13) is a transitional rule for the coming into force of SI 2005/2045 and provides a "soft landing" (HMRC's words) by ignoring defaults for and within the first six months of the new CIS scheme introduced by FA 2004 and SI 2005/2045. It makes no sense to attempt to switch off regulation 4 penalties under s 98A by amending this transitional rule. Since s 103ZA TMA switches off s 98A in any case where Schedule 55 FA 2009 applies, the attempt to do the same in regulation 4 is redundant. But if it was going to be done, it should have been done in another way, for example by amending regulation 4(12) or by amending s 98A TMA.

(ii) in the case of a provision of regulations under section 70(1)(a) or 71 of the Finance Act 2004, £3,000.

(3) For the purposes of subsection (2)(a) above, the relevant monthly amount in the case of a failure to make a return—

(a) where the number of persons in respect of whom particulars should be included in the return is fifty or less, is £100, and

(b) where that number is greater than fifty, is £100 for each fifty such persons and an additional £100 where that number is not a multiple of fifty."

Provisions relating to the determination (assessment) of s 98A TMA penalties are in the Annex.

6. Paragraph 1 Schedule 55 FA 2009 so far as relevant to the CIS and this case says:

"PENALTY FOR FAILURE TO MAKE RETURNS ETC

1(1) A penalty is payable by a person ("P") where P fails to make or deliver a return, or to deliver any other document, specified in the Table below on or before the filing date.

(2) Paragraphs 2 to 13 set out--

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

(b) subject to paragraphs 14 to 17, the amount of the penalty.

(3) If P's failure falls within more than one paragraph of this Schedule, P is liable to a penalty under each of those paragraphs (but this is subject to paragraph 17(3)).

(4) In this Schedule--

"filing date", in relation to a return or other document, means the date by which it is required to be made or delivered to HMRC;

"penalty date", in relation to a return or other document, means the date on which a penalty is first payable for failing to make or deliver it (that is to say, the day after the filing date).

(5) In the provisions of this Schedule which follow the Table--

(a) any reference to a return includes a reference to any other document specified in the Table, and

(b) any reference to making a return includes a reference to delivering a return or to delivering any such document.

	Tax to which return etc relates	Return or other document
…	…	…
6	Deductions on account of tax under Chapter 3 of Part 3 of FA 2004 (construction industry scheme)	Return under regulations under section 70 of FA 2004
…	…	…

Other relevant provisions of Schedule 55 are in the Annex.

Facts

7. From the documents and the oral evidence, none of which were in dispute, we find the following facts:

(1) Up until 2007 the appellant was in partnership with his brother Mr Jackie Whitten ("Jackie"). The appellant was the "hands on" partner dealing with the operational side of the business while Jackie dealt with the paperwork and wages (and we were told that the partnership did not engage subcontractors and was excused from making nil returns).

(2) In 2007 Jackie suffered a stroke. As a result the partnership was dissolved and the appellant set up as a sole trader carrying on construction business. He did not initially engage any subcontractors.

(3) Jackie had come back to the business as a form of therapy but suffered another more debilitating stroke in 2009. Again he came back but the appellant eventually discovered that he was not attending to the paperwork. Early in 2009 the appellant began using subcontractors. He said that they assured him that they would sort out their own tax, and he was not aware that he should have made monthly returns.

(4) On 21 December HMRC opened an enquiry under s 9A TMA into the appellant's income tax return. No addition was made to profits but the officer had noted that the accounts showed payments to subcontractors as one of the expenses of the trade. That officer then notified a CIS team of the possibility that the appellant was making subcontractor payments which should be within the CIS.

(5) In July 2012 the CIS investigator sought information about the payments made by the appellant and asked for the reason why no returns under the CIS had been made.

(6) On 2 July 2013 HMRC issued determinations under regulation 13 of the CIS Regulations to assess the tax that the appellant should have deducted from payments and paid over to HMRC. The determinations covered the tax years 2009/10 to 2012/13, and the tax totalled £2,613.70. There was no appeal against these determinations.

(7) On 11 September 2013 HMRC informed the appellant and his agent that he was liable to penalties:

£88,800.00 under s 98 TMA

£3043.50 under Schedule 55 FA 2009

but they offered to mitigate the s 98A penalties, using HMRC's power to do so in s 102 TMA, to a figure of £3,370.63, giving a total of £6,413.13 including the Schedule 55 penalties. HMRC attached their workings in a schedule showing how the figures were calculated.

(8) After further discussions with HMRC apparently taking into account legislative changes in 2013, the s 98A penalty was reduced to £34,500 and that was the figure determined by HMRC on 22 April 2014. On the same day an assessment under paragraph 18 Schedule 55 FA 2009 was issued in the total sum of £3,043.50.

(9) On 13 May 2014 the appellant appealed against the determinations and the assessment. Following a review which did not change HMRC's view of the matter the appeal was notified to the Tribunal.

(10) HMRC undertook to mitigate the s 98A penalty whatever the outcome of the Tribunal hearing.

Submissions

8. The appellant's submissions are essentially directed at the perceived unfairness and disproportionate effect of the penalties. The complaint it must be noted is directed at all the penalties *after* taking into account HMRC's offer of mitigation of the s 98A penalties. The appellant's point here was that the penalties were still over 100% of the tax "lost", whereas in the experience of the appellant's representative even serious and deliberate tax wrongdoers would be assessed to a penalty of at most 70%, and for a defaults this which was not deliberate the agent would expect a penalty of 10% to 15%, which is what he had offered to HMRC.

9. He distinguished *HMRC v Bosher* [2013] UKUT 579 (TCC) ("*Bosher*") relied on by HMRC in that in *Bosher* the respondent had been registered for the CIS for many years and knew the ropes. His client had been unaware of the CIS without the assistance of his brother and as soon as he knew about it he made every arrangement to file the returns as soon as he could.

10. HMRC's submission were that they had followed the law, and had then given the maximum mitigation under their announced policy for CIS returns moving to the Schedule 55 regime. They also were prepared to accept further mitigation on grounds of exceptional hardship if it could be shown. They stressed again that mitigation would be given whatever the outcome of the appeal (assuming the s 98A penalty was still greater than the mitigated amount).

Discussion

11. We look at the two different types of penalty separately as the law is quite different for each.

Section 98A penalties: have HMRC shown they were properly determined?

12. In any appeals against penalties HMRC have the initial burden of showing that the conditions for imposing the penalties have been met. In relation to the s 98A penalties HMRC must show that the appellant was under an obligation to make monthly returns and that he failed to do so. We have no doubt that HMRC have discharged the burden on them and that the appellant was liable to the penalties. The appellant has not disputed that he should have made the returns but did not make them until May 2012 whereas the due date for making the returns was the 19th of each month from May 2009 to October 2011.

13. We do not have in our papers any record of the determinations themselves, but we do have copies of the notice of the determinations which show the detailed calculations that make them up, and they appear to be correct. The notice shows that the appellant was given the date by which any appeal must be made as is required by s 100(3) TMA and the notice of determination shows that it, and by implication the assessment, meets all other requirements of s 100.

Section 98A penalties: were they disproportionate? And if they were, can we do anything about it?

14. Whatever we might think about a system which allows someone who had failed to make returns of payments to subcontractors, which, when made, showed that they should have deducted and accounted for tax of less than £3,000, to rack up penalties of £88,000 subsequently reduced to £34,500 (for reasons we do not fully fathom), we know from *Bosher* at [63] to [67] that the scheme of penalties is not disproportionate in terms of the European Convention on Human Rights ("ECHR"), because of the power given to HMRC to mitigate under s 102 TMA. HMRC have mitigated in this case in accordance with their published policy, and have offered further mitigation. And in any case in *Bosher* the Upper Tribunal held, based on its own decision in *HMRC v Hok Ltd* [2012] UKUT 363 (TCC) ("*Hok*"), that the First-tier Tribunal is not able to give effect to an appellant's rights under the ECHR. We are bound therefore to say that the appeal on this ground must fail.

15. The fact that the post-mitigation penalty is more than the tax not accounted for on time is irrelevant here. The appellant is not really comparing like with like with his analogy to the serious tax cheat charged a penalty of 70%. With the CIS, as with PAYE, the payer is acting in a quasi-fiduciary capacity: the tax they should have deducted is not their tax but tax due from the payees for which they are accountable. The CIS monthly returns scheme is designed to ensure that a system that has been the subject of much abuse operates efficiently and limits as far as possible the opportunities for tax evasion.

Section 98A penalties: is there a reasonable excuse?

16. Reasonable excuse was not mentioned by the appellant as a ground of appeal or otherwise. We felt that in his account of the background to the incurring of penalties, the appellant was putting forward matters, found by us to be true, which might form the basis of a reasonable excuse. These were his brother's strokes and his unsuccessful attempt to take over responsibility for the paperwork, the appellant's reliance on his brother and the fact that they never engaged subcontractors before 2009. Section 118(2) TMA would seem to be the only relevant provision relating to a reasonable excuse for defaults that consist of failures to make returns that fall outside the ambit of Schedule 55 FA 2009. It says:

> "For the purposes of this Act, a person shall be deemed not to have failed to do anything required to be done within a limited time 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 unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased …"

Since making a monthly return for the CIS is something "required to be done" then the second part of the subsection will, on the face of it, have the effect that no penalties should have been assessed if the appellant had a reasonable excuse for not making them. We know that the appellant submitted returns for the first time in May 2012. That is many years after the problems with Jackie arose and payments to contractors started. There is little in the papers we have about the s 9A enquiry but the papers do show that HMRC were examining "contractors records" in December 2011.

17. In s 118(2) TMA reliance on others is not something which is precluded from providing a reasonable excuse. But the appellant admits that he realised Jackie was not up to the job many years before 2012. Any reasonable excuse based on Jackie's problems would then have ceased at such a time that the filing of the returns in 2012 could not possibly be said to have been done "without reasonable delay" (as required by the tailpiece to s 118(2)'s second sentence). We cannot then say that the appellant can be treated as not having failed to file the returns on time, and thus our initial finding that the determinations are justified stands. The appellant did not seek to offer his own ignorance of the CIS as a reasonable excuse and he accepted that he did not make any enquiries about the CIS of either HMRC or his accountant.

18. We have noted since the hearing another decision of this Tribunal, *Parkinson v HMRC* [2015] UKFTT 0342 (TC) (Judge Cannan and Miss Stott) ("*Parkinson*") in which the facts are similar. In that case the appellant who had been in business for many years as a gardener and landscaper entered into a contract which unusually fell within the scope of the CIS. He used three subcontractors in 2008-09 making payments from which he should have deducted £837.90. The penalties determined

on him under s 98A TMA totalled £31,500, but as in our case, HMRC agreed to mitigate the penalty, reducing it to £3,083.78.

19. Like us the *Parkinson* Tribunal held it was bound by *Bosher* to find that the penalties were not disproportionate. It also considered, like us, that in general there was no reasonable excuse for the failure. It did however allow the appeal against penalties of £4,200 generated by a failure to return a payment of £40 from which the relevant tax that should have been deducted was £12. It did so on the basis that *de minimis no curat lex*, and that that principle provided a reasonable excuse. The Tribunal in *Parkinson* also noted that it might seem odd to ignore a failure to return a payment of £40 when penalties are charged for late nil returns, but in that case it seems that no penalties were charged for nil returns. We do not have the necessary details to say whether there are payments in any month that could be regarded as immaterial, but in any case the appellant in this case *has* been charged penalties for nil returns in at least six months.

20. The Tribunal in *Parkinson* also noted that there is an HMRC policy expressed in booklet CIS340 to ignore nil returns from 6 April 2015, and it suggested that it would be fair to apply that policy retrospectively in that case. We observe that in fact this appears to be a legislative change, in that paragraphs (10) and (11) of regulation 4 of the CIS Regulations were revoked by regulation 2 of the Income Tax (Construction Industry Scheme) (Amendment) Regulations 2015 (SI 2015/429), but not retrospectively. But if HMRC has taken the *Parkinson* Tribunal's remarks into account in that case, then we consider that it should also examine this case in the same light.

Schedule 55 FA 2009 penalties: have HMRC shown they were properly assessed?

21. As with the appeals against the s 98A penalties HMRC have the initial burden of showing that the conditions for imposing the penalties have been met. In relation to the Schedule 55 penalties HMRC must show that the appellant was under an obligation to make monthly returns and that he failed to do so. As with the s 98A penalties, we have no doubt that HMRC have discharged the burden on them and that the appellant was liable to the penalties. The appellant has not disputed that he should have made, but did not in fact make, the returns until May 2012 (in the case of the first six months within the scope of Schedule 55) or until 12 July 2013 (in the case of the remainder) whereas the due date for making the returns was the 19th of each month from November 2011 to June 2013.

22. We do not have in our papers any record of the assessments themselves, but we do have copies of the notice of the assessments which show the detailed calculations that make them up, and we see no errors in them. The notice shows that the appellant was given the date by which any appeal must be made as is required by s 30A(3) TMA 1970 (which is applied to such assessments by paragraph 18(3)(a) Schedule 55) and it meets all other requirements of paragraph 18 Schedule 55 and the provisions of TMA made applicable by that paragraph.

23. However we did note that the notice of assessment of penalties under Schedule 55 FA 2009 was issued on 22 April 2014, and that the schedule apparently attached

to it indicated that a penalty had been charged for months falling more than two years before that date. We therefore wondered whether the time limits for assessing Schedule 55 penalties had been observed. We raised this point in the hearing, but Ms Williams, presenting the case for HMRC, was understandably not able to make submissions on the point without reference to specialists. We therefore directed that both parties should, within 30 days of the date of the directions, make whatever submissions or observations they wished to make on this point. HMRC accordingly wrote to the Tribunal and we deal with their observations below.

24. For penalties under Schedule 55 FA 2009 the time limit for raising them is given in paragraph 19 (here as it stood on 22 April 2014):

> "(1) An assessment of a penalty under any paragraph of this Schedule in respect of any amount must be made on or before the later of date A and (where it applies) date B.
>
> (2) Date A is the last day of the period of 2 years beginning with the filing date.
>
> (3) Date B is the last day of the period of 12 months beginning with—
>
> (a) the end of the appeal period for the assessment of the liability to tax which would have been shown in the return or
>
> (b) if there is no such assessment, the date on which that liability is ascertained or it is ascertained that the liability is nil.
>
> (4) In sub-paragraph (3)(a) "appeal period" means the period during which—
>
> (a) an appeal could be brought, or
>
> (b) an appeal that has been brought has not been determined or withdrawn.
>
> (5) Sub-paragraph (1) does not apply to a re-assessment under paragraph 24(2)(b)."

Paragraph 27 says relevantly:

> "(4) References to a liability to tax, in relation to a return falling within item 6 in the Table (construction industry scheme), are to a liability to make payments in accordance with Chapter 3 of Part 3 of FA 2004."

25. In this case for each month Date A is two years from the 19th of the month on which the end of the tax month falls (ie 14 days from the last day of the month). In the cases of the months ending in November and December 2011 and January, February and March 2012, Date A falls before the date of the notification of the assessments.

26. Date B requires it to be ascertained what is the assessment to tax (which here, by virtue of paragraph 27 means a liability to make payments), if indeed there is

one, as described in sub-paragraph (3)(a), and what return that liability would have been shown in. The returns in relation to which penalties have been imposed in this case are ones made under regulation 4 of the CIS Regulations. The requirements of that regulation are to make a return of payments made to sub-contractors, including the amounts deducted from sub-contractors. There is nothing in that return that shows a "liability to make payments". The other potentially relevant regulations are:

(1) regulation 7 which requires a contractor who was liable to deduct an amount to pay the amount so deducted to HMRC, without an assessment,

(2) regulation 10 which allows HMRC to give notice to the contractor who has not accounted for an amount deducted to make a return showing the amount the contractor is liable to pay,

(3) regulation 11 which allows HMRC to specify the amount due under regulation 7 the contractor is liable to pay, and to serve notice on the contractor requiring payment,

(4) regulation 13 which applies where HMRC have reason to believe that there may be an amount payable for a tax year under the Regulations that has not been paid to them. Where it applies, HMRC may make a determination of the amounts due, and Parts 4, 5, 5A and 6 of TMA (assessment, appeals, collection and recovery) apply as if the determination were an assessment, and the amount determined were income tax.

27. The closest anything in these regulations comes to being a return showing a liability to make payments is a regulation 10 return, but in this case there is no evidence of such a return being required. The closest anything comes to an "assessment to liability to make payments" is a regulation 13 determination (which was made in this case), but it is not called an assessment, and we do not think that that is just a loose use of terminology. That is because paragraph 27(5) Schedule 55 shows that where Parliament wished to equate an assessment with a determination it did so. Furthermore, we note that in s 71 FA 2004 HMRC were given the power to make regulations for the "assessment or otherwise" of the amounts deducted from payments, so we think that a determination is "otherwise". We also note that the Part of the regulations dealing with accounting for payments is not the Part in which regulation 4 (monthly returns) is situated. And in any case a regulation 13 determination is not something that is based on any return, and certainly not a regulation 4 return.

28. But if it is assumed (despite what we say in the previous paragraph) that a regulation 13 determination is an assessment to liability to make payments and is based on a return, in this case such determinations were made under regulation 13 on 2 July 2013 in relation to the 4 months to 5 March 2012 (there were no payments in the other month in question). The determinations were not appealed against and so Date B for those four periods is 30 days from the date of the determination, 1 August 2013. This is earlier than any of the Dates A for those months.

29. Our conclusion then is that the assessments of penalties for the five monthly periods ending 5 November 2011 to 5 March 2012 inclusive are out of time, and must be cancelled. The penalties charged amount to £300 (£100 and £200), £300 (£100 and £200), £300 (£100 and £200), £300 (£100 and £200) and £100, totalling £1300. In their response to the Tribunal's directions (see paragraph 23 above) HMRC agreed that the assessments for these five periods were out of time.

30. We consider that HMRC's excess of zeal in relation to these 5 months of penalties is balanced by an arguably over-generous approach to the "capping" provisions in paragraph 13 Schedule 55. That paragraph gives what HMRC have referred to previously in relation to monthly return penalties as a "soft landing": it is intended for those who newly come into the sub-contractors scheme and limits the penalties applying for the month in which the first ever return is made and any previous months, and limits the paragraph 8 and 9 penalties (1 day and 2 months late) to an overall amount of £3,000 and also removes the minimum £300 penalty for paragraph 10 and 11 penalties. In this case the first ever return was made on 15 May 2012 when the first six returns under the scheme were made. The penalties for those returns are £1,400 so it would seem that capping is not in point. HMRC seem to have regarded the returns made on 12 July 2013 (all of the then outstanding returns) as within the capping as well (we are ignoring here the possible effect of our cancellation of nine of the ten penalties that relate to the returns made on 15 May 2012).

31. We could in theory exercise our power in paragraph 22(2)(b) Schedule 55 to remake the decision to remove the generosity (as the capping limit still applies on the HMRC approach even after the cancellation), but we have no idea how capping itself is taken into account in the assessing process where each individual penalty under each paragraph of Schedule 55 for each month for which there is a default has to be separately assessed (direct taxes having no concept of a global assessment), and equally no idea how we should undo the capping. However as HMRC were not seeking to rein back their own generosity, neither shall we.

32. But it might also be said that six penalties totalling £43.50 charged under paragraphs 10 and 11 of Schedule 55 are £43.50 too much, as it could be argued that there are no paragraph 10(2)(a) and 11(5)(a) penalties possible here. Those tax-geared penalties are calculated as "5% of any liability to make payments which would have been shown in the return in question". The "return in question" we know is the return referred to in item 6 in the Table in paragraph 1 Schedule 55. That return is a "return under regulations under section 70 of FA 2004". A regulation 4 return for a month does not show any "liability to make payments". It is a record of what deductions have been made, if any. As we have not sought HMRC's submissions on this point we do not intend to cancel those assessments, and we are mindful that if we are right about the way penalties under paragraphs 10 and 11 of Schedule 55 are calculated, we are as a result calling into question the calculation of the extended penalties under paragraph 6D(5) and (7) of Schedule 55 for failure to make Real Time Information returns under regulation 67B of the Income Tax (Pay As You Earn) Regulations 2003 (SI 2003/2682). That is something whose significance requires full argument.

33. We add here that no similar time limit issue arises in relation to the penalties charged under s 98A TMA even though the filing date for the monthly returns is earlier than the date of the determination of the penalties (also 2 July 2014). This is because by s 103(4) TMA:

> "A penalty to which subsection (1) does not apply [the case here] may be so determined … at any time within six years after the date on which the penalty was incurred or began to be incurred."

and the earliest s 98A penalty was incurred on 19 May 2009, less than six years before the date of the determination of the penalties.

Schedule 55 penalties: were they disproportionate?

34. We are taking the appellant as arguing that the Schedule 55 penalties are disproportionate as the total assessed is more than 100% of the regulation 13 determinations of the relevant periods. In *Bosher* at [66] the Upper Tribunal said that the monthly penalties in s 98A TMA of £1,200 for a twelve month period of delay were not disproportionate. In Schedule 55 the equivalent amount is £900 subject to the possibility that under paragraphs 10 and 11 that 5% of the tax due may be greater than £300. We cannot see how Schedule 55 could possibly be disproportionate if s 98A(2)(a) is not. And it remains the case that, in the light of *Hok* that we could not do anything about it even if we were to hold that the Schedule 55 penalties here were disproportionate.

35. And we reiterate that the appellant is not comparing like with like in his comparison with what we assume he is referring to, Schedule 24 FA 2007 penalties for deliberate inaccuracies in accounts etc.

Schedule 55 FA 2009 penalties: was there a reasonable excuse?

36. In Schedule 55 the "reasonable excuse" provision is in paragraph 23. In addition to the requirements that a reasonable excuse must persist for the duration of the default that is also found in s 118(2) TMA, paragraph 23 discounts any excuse based on lack of funds (not an issue here). It also prevents reliance on another person unless the appellant took reasonable care themselves to avoid the failure. We do not consider whether the appellant had a reasonable excuse within paragraph 23 in that he relied on others and took reasonable care to avoid his failures in so doing, because the reason we found there to be no reasonable excuse for the purposes of s 118 TMA applies here also: if there was a reasonable excuse it ceased before the returns were filed and the period between them cannot be characterised as leading to the conclusion that the default was remedied without unreasonable delay after the excuse ceased (as required by paragraph 23(2)(c)).

37. Our remarks at paragraph 20 of this decision about the possible retrospective application of the change to the treatment of nil returns applies to Schedule 55 penalties as it does to s 98A TMA penalties.

Concluding remarks

38. We wish to add some observations about the bundle of legislation provided to us by HMRC. The main problem was that we only had every other page of each piece of legislation, something which mattered in the case of regulation 4 of the CIS Regulations and Schedule 55 FA 2009. The pages we did have were faint, and where we did have legislation it was of the law as it stood in 2015, and did not reflect that some of the legislation had been amended during and since the period covered by the appeals. And since HMRC had referred extensively to *Bosher* in correspondence including in their Statement of Case we were surprised to find no case law authorities, not even *Bosher*, supplied to us. We add that this was not the fault of Ms Williams but of those preparing the bundles.

39. One piece of legislation that was cited to us, and featured in HMRC's Statement of Case, was s 50 TMA. It is irrelevant. Section 50 TMA gives the Tribunal its powers when it is dealing with assessments to income tax, capital gains tax and corporation tax. Where a penalty determination under s 100 is concerned, section 100B(2) TMA, which was not included in the bundle, says explicitly that s 50 does *not* apply. Paragraph 21 Schedule 55 admittedly says that an appeal under paragraph 20 is to be treated in the same way as an appeal against an assessment to the tax concerned. Regulation 13(5) of the CIS Regulations provides that a regulation 13 determination is subject to Part 5 TMA (appeals), so which includes s 50, as if a determination was an assessment and the deduction under the regulations was income tax, so, on the face of it, s 50 TMA applies, but paragraph 21(2)(b) Schedule 55 makes it clear that if there is an express provision of Schedule 55 dealing with powers of the Tribunal on appeal, then the general words of paragraph 21(1) do not apply: and there is such an express provision about powers in paragraph 22, which is the provision we are apply here in relation to the Schedule 55 penalties.

Decision

40. By virtue of the power in s 100B(2)(a)(ii) TMA we confirm all the determinations of penalties charged under s 98A TMA 1970.

41. By virtue of the power in paragraph 22(1) Schedule 55 FA 2009:

(1) We cancel the decision of HMRC to assess penalties as follows:

Month ended 6 November 2011	Penalty £100 under paragraph 8 Schedule 55
Month ended 6 November 2011	Penalty £200 under paragraph 9 Schedule 55
Month ended 6 December 2011	Penalty £100 under paragraph 8 Schedule 55
Month ended 6 December 2011	Penalty £200 under paragraph 9 Schedule 55
Month ended 6 January 2012	Penalty £100 under paragraph 8 Schedule 55
Month ended 6 January 2012	Penalty £200 under paragraph 9 Schedule 55

Month ended 6 February 2012	Penalty £100 under paragraph 8 Schedule 55
Month ended 6 February 2012	Penalty £200 under paragraph 9 Schedule 55
Month ended 6 March 2012	Penalty £100 under paragraph 8 Schedule 55

(2) We affirm the decision of HMRC to assess all the remaining penalties.

42. 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.

RICHARD THOMAS

TRIBUNAL JUDGE
RELEASE DATE: 09/10/2015

ANNEX

PART 10 TMA

…

100 Determination of penalties by officer of Board

(1) Subject to subsection (2) below and except where proceedings for a penalty have been instituted under section 100D below …, an officer of the Board authorised by the Board for the purposes of this section may make a determination imposing a penalty under any provision of the Taxes Acts and setting it at such amount as, in his opinion, is correct or appropriate.

(2) Subsection (1) above does not apply where the penalty is a penalty under--

…

(d) paragraph (a)(i) of section 98A(2) above as it has effect by virtue of section 165(2) of the Finance Act 1989[2] …

…

(3) Notice of a determination of a penalty under this section shall be served on the person liable to the penalty and shall state the date on which it is issued and the time within which an appeal against the determination may be made.

(4) After the notice of a determination under this section has been served the determination shall not be altered except in accordance with this section or on appeal.

(5) If it is discovered by an officer of the Board authorised by the Board for the purposes of this section that the amount of a penalty determined under this section is or has become insufficient the officer may make a determination in a further amount so that the penalty is set at the amount which, in his opinion, is correct or appropriate.

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[2] We include this because it has befuddled us, or at least the judge in this case, before. Since the penalties charged in this case are charged under s 98A(2)(a) TMA this subsection seems to apply to prevent a determination under s 100(1) TMA and to require proceedings under s 100C. But this is not the case. To find out why it is necessary to examine s 165 FA 1989, subsection (1) of which inserted s 98A(2) in the form that it still has. But s 165(2) then contradicts s 165(1) by stating that "[i]n relation to a failure to make a return beginning before such day as the Treasury may by order made by statutory instrument appoint, section 98A(2) shall have effect with the substitution of the following paragraph for paragraph (a)— "(a) to—□(i) a penalty not exceeding twelve times the relevant monthly amount, and …". Then by the Finance Act 1989, section 165(2), (Appointed Day) Order 1994 (SI 1994/2508 c. 50) 20 May 1995 was appointed as the day on which s 165(2) ceased to have effect and the current version of ss (1) came into force. Thus s 98A(2)(a) as inserted by s 165(1), not s 165(2) came into force and remains in force and is a penalty to which s 100(1) applies and not s 100(2). The purpose of delaying the introduction of a Revenue determination rather than proceedings was to allow an automated system of charging penalties to be devised and brought into commission in 1995.

…

100A Provisions supplementary to section 100

(2) A penalty determined under section 100 above shall be due and payable at the end of the period of thirty days beginning with the date of the issue of the notice of determination.

(3) A penalty determined under section 100 above shall for all purposes be treated as if it were tax charged in an assessment and due and payable.

100B Appeals against penalty determinations

(1) An appeal may be brought against the determination of a penalty under section 100 above and, subject to ... the following provisions of this section, the provisions of this Act relating to appeals shall have effect in relation to an appeal against such a determination as they have effect in relation to an appeal against an assessment to tax except that references to the tribunal shall be taken to be references to the First-tier Tribunal.

(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.

…

102 Mitigation of penalties

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

103 Time limits for penalties

(1) Subject to subsection (2) below, where the amount of a penalty is to be ascertained by reference to tax payable by a person for any period, the penalty may be determined by an officer of the Board … --

(a) at any time within six years after the date on which the penalty was incurred, or

(b) at any later time within three years after the final determination of the amount of tax by reference to which the amount of the penalty is to be ascertained.

(4) A penalty to which subsection (1) does not apply may be so determined … at any time within six years after the date on which the penalty was incurred or began to be incurred.

103ZA Disapplication of sections 100 to 103 in the case of certain penalties

Sections 100 to 103 do not apply to a penalty under--

(d) Schedule 55 to FA 2009 (penalties for failure to make returns etc), ...

SCHEDULE 55 FA 2009

AMOUNT OF PENALTY: OCCASIONAL RETURNS AND ANNUAL RETURNS

2 Paragraphs 3 to 6 apply in the case of a return falling within any of items 1 to 5 and 7 to 13 in the Table.

AMOUNT OF PENALTY: CIS RETURNS

7 Paragraphs 8 to 13 apply in the case of a return falling within item 6 in the Table.

8 P is liable to a penalty under this paragraph of £100.

9 (1) P is liable to a penalty under this paragraph if (and only if) P's failure continues after the end of the period of 2 months beginning with the penalty date.

(2) The penalty under this paragraph is £200.

10 (1) P is liable to a penalty under this paragraph if (and only if) P's failure continues after the end of the period of 6 months beginning with the penalty date.

(2) The penalty under this paragraph is the greater of—

(a) 5% of any liability to make payments which would have been shown in the return in question, and

(b) £300.

11 (1) P is liable to a penalty under this paragraph if (and only if) P's failure continues after the end of the period of 12 months beginning with the penalty date.

...

(5) In any other case, the penalty under this paragraph is the greater of—

(a) 5% of any liability to make payments which would have been shown in the return in question, and

(b) £300.

13 (1) This paragraph applies—

(a) at any time before P first makes a return falling within item 6 in the Table, to any return falling within that item, and

(b) at any time after P first makes a return falling within that item, to that return and any earlier return.

(2) In respect of any return or returns to which this paragraph applies—

(a) paragraphs 10(2)(b) and 11(5)(b) do not apply, and

(b) P is not liable to penalties under paragraphs 8 and 9 which exceed, in total, £3,000.

(3) In sub-paragraph (1)(b) "earlier return" means any return falling within item 6 which has a filing date earlier than the date on which P first made a return.

SPECIAL REDUCTION

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

(2) In sub-paragraph (1) "special circumstances" does not include—

(a) ability to pay, or

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—

(a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty.

ASSESSMENT

18 (1) Where P is liable for a penalty under any paragraph of this Schedule HMRC must—

(a) assess the penalty,

(b) notify P, and

(c) state in the notice the period in respect of which the penalty is assessed.

(2) A penalty under any paragraph of this Schedule must be paid before the end of the period of 30 days beginning with the day on which notification of the penalty is issued.

(3) An assessment of a penalty under any paragraph of this Schedule—

(a) is to be treated for procedural purposes in the same way as an assessment to tax (except in respect of a matter expressly provided for by this Schedule),

(b) may be enforced as if it were an assessment to tax, and

(c) may be combined with an assessment to tax.

(4) A supplementary assessment may be made in respect of a penalty if an earlier assessment operated by reference to an underestimate of the liability to tax which would have been shown in a return.

(5) A replacement assessment may be made in respect of a penalty if an earlier assessment operated by reference to an overestimate of the liability to tax which would have been shown in a return.

19 (1) An assessment of a penalty under any paragraph of this Schedule in respect of any amount must be made on or before the later of date A and (where it applies) date B.

(2) Date A is the last day of the period of 2 years beginning with the filing date.

(3) Date B is the last day of the period of 12 months beginning with—

(a) the end of the appeal period for the assessment of the liability to tax which would have been shown in the return, or

(b) if there is no such assessment, the date on which that liability is ascertained or it is ascertained that the liability is nil.

(4) In sub-paragraph (3)(a) "appeal period" means the period during which—

(a) an appeal could be brought, or

(b) an appeal that has been brought has not been determined or withdrawn.

(5) Sub-paragraph (1) does not apply to a re-assessment under paragraph 24(2)(b).

APPEAL

20 (1) P may appeal against a decision of HMRC that a penalty is payable by P.

(2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P.

21 (1) An appeal under paragraph 20 is to be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or Upper Tribunal).

(2) Sub-paragraph (1) does not apply—

(a) so as to require P to pay a penalty before an appeal against the assessment of the penalty is determined, or

(b) in respect of any other matter expressly provided for by this Act.

22 (1) On an appeal under paragraph 20(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 20(2) that is notified to the tribunal, the tribunal may

(a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had power to make.

(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 16—

(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 16 was flawed.

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

(5) In this paragraph "tribunal" means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 21(1)).

REASONABLE EXCUSE

23 (1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a return if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.

(2) For the purposes of sub-paragraph (1)—

(a) an insufficiency of funds is not a reasonable excuse, unless attributable to events outside P's control,

(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and

(c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

INTERPRETATION

27 (1) This paragraph applies for the construction of this Schedule.

(3) "HMRC" means Her Majesty's Revenue and Customs.

(4) References to a liability to tax, in relation to a return falling within item 6 in the Table (construction industry scheme), are to a liability to make payments in accordance with Chapter 3 of Part 3 of FA 2004.

JUDGE THOMAS

TRIBUNAL JUDGE

RELEASE DATE; 09/10/2015