[2018] UKFTT 568 (TC)

TC06742

Appeal number: TC/2017/05262

EMPLOYMENT INTERMEDIARIES RETURNS - penalties for failing to file returns for three periods - no evidence that an authorised officer of the Board made a determination under Section 100 TMA 1970 - HMRC policy seemingly inconsistent with the law - no reasonable excuse - penalties proportionate - reduction under Section 100B TMA 1970 - appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ROBERT, ADAM AND DOROTHY THORNTON TRADING AS A* EDUCATION **Appellant**

- and -

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL
MRS NORAH CLARKE

Sitting in public at Bristol on 3 April 2018

Robert Thornton and Adam Thornton, for the Appellant

Rhiannon Lewis and John Weaver, officers of HMRC, for the Respondents

DECISION

Nature of the appeal

1. This is an appeal against a penalty for £1750 (in fact three penalties; one of £250, one of £500 and one of £1,000) imposed by the respondents (or "**HMRC**") under section 98(1)(b) of the Taxes Management Act 1970 ("**TMA 1970**") for the failure to file Employment Intermediaries returns (the "**Returns**") on time under regulation 84F of the Income Tax (PAYE) Regulations 2003 for three tax quarters ending 5 July 2016 (£250), 5 October 2016 (£500) and 5 January 2017 (£1,000).

Employment Intermediaries returns

2. An employment intermediary within the meaning of section 716B Income Tax (Earnings and Pensions) Act 2003 must for each tax quarter provide to HMRC specified information relating to payments made to agency workers for whom it has not operated PAYE. The information to be provided is specified in Regulation G of the PAYE Regulations and must be included in a return in a form prescribed by HMRC. The return must be made no later than the end of the tax month following the end of the tax quarter using an approved method of electronic communication. It is a taxpayer's responsibility to register online, and to upload the return.

3. Once a taxpayer has filed a return, the responsibility for filing intermediary returns continues for each successive tax quarter until either the taxpayer has not satisfied the relevant conditions, for four successive tax quarters (demonstrated by a taxpayer filing a nil return) or until the taxpayer notifies the HMRC that it is no longer a specified employment intermediary.

Penalties for non-compliance

4. An employment intermediary who fails to file a return for a tax quarter on time is liable to a penalty under section 98(1)(b) of TMA 1970. The relevant provisions of section 98 of TMA 1970 provide for an initial penalty not exceeding £3,000 and if the failure continues after the initial penalty has been imposed, a further penalty or penalties not exceeding £600 per day.

5. The amount of the penalty is based on the number of offences in a 12 month period. HMRC's policy is to assess an amount of £250 for the first offence, £500 for a second offence and £1,000 for a third and later offences.

6. In order to visit a penalty under section 98 of TMA 1970 for failure to deliver a timely return, HMRC must determine the penalty pursuant to the provisions of section 100 TMA 1970.

Facts

7. Both Robert Thornton and Adam Thornton gave oral evidence. We found them to be honest and credible witnesses and accept their evidence save as regards one matter with which we deal at [48] - [54] below. HMRC tendered no oral evidence.

8. In addition, the tribunal was given a bundle of documents which included documentary evidence.

9. From this evidence, we find the following facts:

(1) The appellants' business involves the recruitment and placing of supply teachers. Adam Thornton contacts teachers who want to provide either full time or part time teaching. He finds these teachers by a number of means (word of mouth, websites, answers to advertisements put out by the appellant etc.).

(2) He then contacts local schools to see whether they have teaching needs, and then supplies the appropriate teacher to fulfil those needs.

(3) The appellant contracts with the school to provide the teachers. Payment for the supply of those teachers is invoiced by the appellant to the school. The appellant then pays the teacher (mainly under deduction of PAYE and NICs).

(4) The issue in this case has arisen because, in the quarters under appeal, a number of teachers were self-employed.

(5) At some time in those quarters, the appellant supplied the services of two self-employed teachers to schools. It was therefore an employment intermediary for each of those periods as it satisfied the statutory criteria set out in Regulation 84E (in other words, at some time in the relevant quarters it was an agency supplying more than one individual to a client, payment to those individuals were made without deducting tax at source under PAYE, and the supplies of those individuals was not on the continental shelf).

(6) The appellant should, therefore, have submitted returns for these three quarters on 5 August 2016, 5 November 2016 and 5 February 2017.

(7) In February 2017, Robert Thornton received a telephone call on his home number from a company which was undertaking a survey regarding the employment intermediaries regime. They questioned whether the appellant was an employment intermediary and, having had that concept described to him by the survey company, Robert Thornton thought that the activities of the appellant might mean that they were an employment intermediary.

(8) That prompted him to ring what he understood to be an HMRC helpline and he spoke to somebody at HMRC called Andy on 22 February 2017. He was told by Andy that HMRC could not know whether the appellant employed

teachers who were subject to the employment intermediary regime and therefore there was no need to submit reports going back to 2015.

(9) However, notwithstanding that he thought there were no fines or penalties, Robert Thornton then submitted the relevant returns online. He did this on 22 February 2017.

(10) On 24th and 27th February 2017, the respondents sent Notifications of Charge and Notice to Pay (the "**Notifications**") to the appellants. These related to the first two failures. As regards to the third failure, a Notification was sent to the appellant on 24th February 2017, but it charged the incorrect amount. It was subsequently withdrawn by the respondents and a Notification in the correct amount was issued to the appellant on 27 February 2017.

(11) HMRC describes these documents as "late reporting penalties". The evidence of these in the bundles each comprises a photocopy of a document entitled "Notification of Charge and Notice to Pay". It is a completed pro forma, which, as can be seen from [24] following HMRC's response to our directions, comprises a computer generated document. No evidence has been given to us as to whether any covering letter was sent with each of these documents, but we suspect not. HMRC have certainly not supplied any covering letter.

(12) The appellant appealed against the penalties to the respondents. The appeal was considered and rejected by the respondents by way of a letter dated 5 April 2017.

(13) On 18 April 2017, the appellant requested an independent review. The outcome of this review was to uphold the respondents' decision to issue the penalties.

(14) The appellant appealed to the FTT on 21 June 2017.

Burden of proof etc

10. The burden of establishing that the appellant is prima facie liable to the penalties which must be assessed and notified in accordance with the law lies with HMRC. It is for them to prove each and every factual matter said to justify the imposition of the penalties on this particular taxpayer.

11. Once HMRC have established that the appellant is prima facie liable to the penalties, the burden of establishing that the appellant has a reasonable excuse and/or the penalties are disproportionate, then switches to the appellant.

12. In either case, the standard of proof is the civil standard of proof, namely the balance of probabilities or more likely than not.

13. We consider that we have jurisdiction to consider the validity of the penalty assessments (i.e. the Notifications) given by HMRC to the appellant in this case.

14. We say this on the basis of two cases, *Burgess and Brimheath v HMRC* [2015] UKUT 578, and *Wandsworth London Borough Council v Winder* [1984] 3AER 976.

15. In *Burgess*, the issue was whether the FTT had made an error of law in relation to a discovery assessment. The validity of the discovery assessment in that case depended on whether the relevant conditions for the issue of a discovery assessment had been met.

16. In that case, the court held (at paragraph 53) that:

> "…in these circumstances we must find that the FTT made an error of law…the error of law is not that the FTT failed to address a relevant issue. It is that in the absence of a positive case put by HMRC in relation to the competence and time limit issues, the FTT erred in law in not finding that HMRC had failed to discharge the burden of proof in those respects such that the assessments could not be regarded as having been validly made and the appeals must accordingly be allowed"

17. We consider that *Burgess* is authority for two propositions.

18. The first is that the FTT does have jurisdiction to "look behind" a notice given by HMRC to a taxpayer, and to consider its validity, if a giving of that valid notice is a matter which HMRC must establish as a prerequisite to the taxpayer's liability in that case. This is true whether or not the question of the validity of the notice has been raised by an appellant.

19. Secondly, failure by the FTT not to make a finding as to the validity of any such notice (or in respect of any matter on which that validity depends) is an error of law.

20. Our sentiments in this respect are reinforced by the House of Lords' decision in *Wandsworth*. In *Barry Lennon v HMRC* [2018] UKFTT0220, at [24(10-)40], Judge Popplewell has undertaken a comprehensive review of the case of *Wandsworth v Winder.* It is clear to us, for the reasoning given by Judge Popplewell in that decision, that it is not an abuse of process for a citizen to challenge the validity of a notice given to it by a public body by way of a defence to a claim brought by that public body. As that extract shows, there are a number of comments made by judges in the Court of Appeal to the effect that whilst this might be something of a nuisance to that public authority, it does not follow that it is an abuse for a citizen to raise the validity of a notice in the relevant proceedings.

Section 100 TMA 1970

21. Given that it is for HMRC to establish that they have served a valid penalty notice on the appellant, we turn first to the relevant provisions which Miss Lewis accepts are in section 100 TMA 1970. This reads as follows:

Determination of penalties by officer of Board

100(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 at such amount as, in his opinion, is correct or appropriate.

100(2) ……..

100(2)A……

100(3) ……..

100(4) ……..

100(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 this opinion, is correct or appropriate.

22. We have a number of observations on section 100 TMA 1970:

(1) The use of the word "may" means HMRC have a discretion as to whether an officer of the Board should make a determination imposing a penalty. But once they have decided to impose a penalty, the determination must be made by an officer of the Board. It does not mean that having decided to impose the penalty, HMRC have two choices. One is to have the determination made by an officer of the Board; the other involves an alternative assessment and notification regime. There is but one regime, and that is that the determination must be made by an officer of the Board authorised for the purposes of section 100 TMA 1970 to make the determination.

(2) Our understanding is that all officers of the Board are authorised whatever their grade.

(3) The authorised officer is a real officer. It is not a computer. Nor is it HMRC. In this respect HMRC's submissions recorded in the First-tier Tribunal Decision of *Donaldson* (*Robert Morgan and Keith Donaldson v HMRC* [2013] UKFTT 317) are instructive.

> *"Meaning of "HMRC decide"*
>
> 28. In particular, it is HMRC's case that the requirement for "HMRC" to "decide" was met. It says this for a number of reasons.
>
> 29. Decision by authorised officer not required: Firstly, it contrasts it with the requirement for any particular officer to make a decision. For instance,

certain penalties can only be imposed by an officer of the Board authorised by the Board for the purpose. The most obvious example is in s 100(1) TMA which provides:

> "….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."

Subsection (2) contains exceptions to this rule. As s 100C(1) makes clear, any penalty within the exception could only be imposed by an officer of the Board with the permission of this Tribunal. So penalties under the Taxes Acts require a decision of an authorised officer."

(4) So it seems that HMRC themselves recognise, as per their submissions in *Donaldson* above, that a real life officer of the Board must make the determination.

(5) *Donaldson* was concerned with the imposition of late filing and daily penalties under Schedule 55 Finance Act 2009, and in particular with the provisions of paragraph 4(1)(b) of that Schedule which reads "HMRC decide that such a penalty should be payable….".

(6) It is in the context of distinguishing a decision by HMRC from a decision made by an officer of the Board that HMRC made their submissions set out above.

23. Mindful of this, having read the papers and discussed the position with Miss Lewis, and having seen that the only evidence that HMRC had adduced in the papers that a section 100 TMA 1970 compliant determination had been made by an officer of the Board comprised the Notifications, we issued directions directing HMRC to provide written submissions evidencing the name of the HMRC officer who made the penalty determination; details and evidence of how and when that officer made the determination; the process by which the HMRC computer was then instructed to send notification to the appellant; and how those determinations were subsequently recorded on the appellant's computer records.

24. HMRC has substantively responded with the following submission

> "The Respondents are required to supply the name of the HMRC Officer who made the penalty determinations. We are not able to supply that name, as the process by which the penalties are issued, is an automated one. A high level decision was taken by HMRC to impose penalties for failure to file an employment intermediaries return on time. In that respect, the Respondents have exercised their discretion in relation to defaulting taxpayers as a body. A computer was programmed in accordance with that decision to automatically issue a penalty notice.

The process by which a penalty is issued is as follows:

(i) The system expects a report at a given point up to one month after the due date for a quarterly report. At that point, a penalty is generated.

(ii) The notices are then printed and posted.

(iii) Initially the system was subject to manual checks, until 2016/2017 Quarter 4. Now the process is established, spot checks are undertaken periodically.

Any business that reports for the first time and submits a number of retrospective reports, have a liability start date recognised. Where a report is submitted late, the system issues the appropriate number of penalties…[illegible] being programmed to do this as a result of policy intent.

The appellants in this appeal did report for the first time and submit retrospective reports, and therefore the system responded as described above".

25. We do not accept that a high level decision taken by HMRC to impose penalties in these cases comprises a determination by an officer of the Board for the purposes of Section 100 TMA 1970. Whilst it is true that such a high level decision was accepted by the Court of Appeal in *Donaldson* as fulfilling HMRC's obligation to give notice to a taxpayer pursuant to paragraph 4 of Schedule 55 Finance Act 2009, that was in the context of paragraph 4 which, as set out above, states that "HMRC decide that such a penalty is payable". This is in stark contrast to Section 100 TMA 1970 where the determination is to be made not by HMRC but by an officer of the Board.

26. It is clear to us from both the evidence presented to us at the hearing and the subsequent submissions by HMRC set out above that no officer of the Board made the relevant determination of these penalties.

27. Furthermore, HMRC have not suggested in their submissions that there might be saving provisions (for example such as those set out in section 113 or 114 TMA 1970) which might provide a statutory basis for a computerised determination.

28. It seems to us that if HMRC are suggesting that their policy is that no officer of the Board makes a determination in relation to penalties for late filing of Employment Intermediaries returns and the penalties are not only recorded and notified by a computer but also determined by a computer (i.e. there is no human intervention in the determination process) then their policy may well be inconsistent with the law.

29. As we have said at [10] above, it is incumbent on HMRC to satisfy us that it is more likely than not that the penalty has been properly determined under section 100 TMA 1970.

30. In light of what we have said above, we cannot come to that conclusion. Indeed we come to a wholly contrary conclusion; namely that no valid determination of the

penalties has been made by an officer of the Board pursuant to section 100 TMA 1970.

31. On the basis of this we must allow the appeal. But in case we are wrong on the section 100 TMA 1970 point, we have gone on to consider reasonable excuse, proportionality and the impact of section 100B TMA 1970.

Submissions

32. The appellants' position is that:

(1) It did not know of the requirement to submit the return. HMRC did not tell the appellant about the changes, specifically, which HMRC should have done given that the appellant is a small employer who cannot afford to employ professionals to notify it about changes in the law.

(2) The only indication of the change was contained in two HMRC Quarterly Bulletins in which the changes were mentioned in insignificant paragraphs and Robert Thornton did not realise their importance.

(3) They were told by HMRC, over the phone, that there was no need to submit the returns.

(4) The penalties are "totally incompatible" with the error. We take this as meaning that the penalties are disproportionate to the seriousness of the failure.

33. The respondents submit that:

(1) Ignorance of the law is no excuse.

(2) In this case, Robert Thornton accepts that he relies entirely on HMRC's Quarterly Bulletins to keep up to date and that he should perhaps have been more diligent and looked into the position further. So even if ignorance of the law can be an excuse, there is no reasonable excuse in this case.

(3) The penalties are proportionate and in any event have been reduced from the possible maximum amounts (£3,000 in each case) to £250, £500 and £1,000.

(4) The Tribunal has no power to adjust a penalty simply because it might be perceived as being unfair.

Reasonable excuse

34. Under section 118(2) TMA 1970, the appellant can avoid liability for the penalties provided it can show that it had a reasonable excuse for failing to submit the returns on time.

35. Section 118(2) TMA 1970 provides

> "(2) 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"

36. The test we adopt in determining whether the appellant has a reasonable excuse is that set out in *the Clean Car Co Ltd v C&E Commissioners* [1991] VATTR 234, in which Judge Medd QC said:

> "The test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?"

37. Although the Clean Car case was a VAT case, it is generally accepted that the same principles apply to a claim of reasonable excuse in direct tax cases.

38. Indeed, in the First-tier Tribunal case of *Nigel Barrett* [2015] UKFTT0329 (a case on late filing penalties under the CIS) Judge Berner said:

> "The test of reasonable excuse involves the application of an impersonal, and objective, legal standard to a particular set of facts and circumstances. The test is to determine what a reasonable taxpayer in the position of the taxpayer would have done in those circumstances, and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard."

39. HMRC's Compliance Manual recognises that reasonable care cannot be identified without consideration of a particular person's abilities and circumstances, and HMRC recognises the wide range of abilities and circumstances of persons completing returns or claims.

> "So whilst each person has a responsibility to take reasonable care, what is necessary for each person to discharge that responsibility has to be viewed in the light of that person's abilities and circumstances".
>
> "In HMRC's review it is reasonable to expect a person who encounters a transaction or other event with which they are not familiar to take care to find out about the correct tax treatment or to seek appropriate advice".

40. In this case, the appellant submits that it has a reasonable excuse based (simply stated) on an ignorance of the law.

41. There have been a number of cases, relatively recently (usually in the context of reasonable excuse for failing to submit a non-resident CGT return), as to whether ignorance of the law, can, in principle, comprise a reasonable excuse for failure to submit a return on time.

42. The Upper Tribunal have considered this in the case of *Christine Perrin v The Commissioners for HMRC* [2018] UKUT 156. In that case, the Upper Tribunal made the following observation.

> "82. One situation that can sometimes cause difficulties is when the taxpayer's asserted reasonable excuse is purely that he/she did not know of the particular requirement that has been shown to have been breached. It is a much-cited aphorism that "ignorance of the law is no excuse", and on occasion this has been given as a reason why the defence of reasonable excuse cannot be available in such circumstances. We see no basis for this argument. Some requirements of the law are well-known, simple and straightforward but others are much less so. It will be a matter of judgment for the FTT in each case whether it was objectively reasonable for the particular taxpayer, in the circumstances of the case, to have been ignorant of the requirement in question, and for how long. The Clean Car Co itself provides an example of such a situation."

43. In light of the decision in *Perrin* and the extract therefrom at [42] above, ignorance of the law can, potentially, comprise reasonable excuse.

44. However, the test is whether it is objectively reasonable for a taxpayer in the circumstances of this case to have been ignorant of the requirement in question. That taxpayer is one who is conscious of and intends to comply with his obligations to tax, but who has the experience and attributes of the taxpayer in question in the situation of that taxpayer.

45. We are acutely aware of the difficulties faced by small businesses in coming to terms with the raft of legislation and guidance published by HMRC. Robert Thornton told us that there are over 8,000 pages of tax related information on HMRC's website which he could not possibly have checked. There are a bewildering array of sources and even seasoned tax professionals find it difficult to keep abreast of all the ongoing changes to tax law and practice.

46. But the appellants' business is one of supplying staff and the tax law applicable specifically to such a business is reasonably straightforward and self-contained.

47. Furthermore, HMRC regularly publish Employer Bulletins to assist employers and also provide a facility which enables an employer to register with HMRC to enable the employer to be sent electronic alerts and updates.

48. In this case, there is a slight evidential difference concerning two such Employer Bulletins, those numbered 54 and 55, issued in June 2015 and August 2015 respectively.

49. In its grounds of appeal, the appellant states that "The only possible mention of its introduction was in two of the Bulletins sent out by the HMRC. In each of the Bulletins this was such an insignificant paragraph amongst everything else that I did not realise its importance".

50. This suggests to us that Robert Thornton was aware of those Bulletins at the time that they were circulated (and we remind ourselves that June 2015 and August 2015 considerably predates the due filing dates for the relevant returns which were in August and November 2016 and in February 2017).

51. And the expression "I did not realise its importance" implies to us that that realisation was in June and August 2015.

52. Furthermore, in his letter to HMRC of 23 March 2017 Robert Thornton states:

> "As a small business we rely entirely on HMRC Quarterly Bulletins to keep up to date with our responsibilities and can only submit in mitigation that our understanding from the 2015 Bulletins 54 and 55 that we were not necessarily required to comply, as both stated quite clearly;-
>
> > "If you supply two or more workers to a client but don't operate PAYE for these individuals you may be classed as an employment intermediary and should be sending in quarterly reports to HMRC".
>
> Perhaps we should have been more diligent and looked further into this, but frankly we consider that HMRC should have made more of an effort to make small firms like ourselves, without specialist accounts and Human Resource advice readily available, aware of these important changes".

53. However, when cross-examined by Miss Lewis at the hearing, Robert Thornton said that he had only found out about these Bulletins in 2017 when the matter in dispute in this appeal came to a head.

54. We do not accept this. We think that the appellant did receive Bulletins 54 and 55 in June 2015 and August 2015 but paid insufficient attention to them at the time.

55. But what of the criticism that the changes were hidden away in insignificant paragraphs?

56. We accept that in Bulletin 55, the contents refer to "workers employed through an employment intermediary" and it might not have been immediately apparent to Robert Thornton that the appellant fell within the description.

57. However, Employer Bulletin 54, in its contents section on the first page states "16 new reporting rules for business supplying staff".

58. The appellant falls plum within that category, and the corresponding text sets out in clear language what is required of such a business. In the first line of that text

the words "employment intermediaries" is used, and it seems clear to us that it is used in the context of a business supplying staff. So we are somewhat surprised that the appellant did not realise that the article in Bulletin number 55 also applied to it.

59. But be that as it may. It is our view that the information about the changes contained in Bulletin 54 of which the appellant was aware in 2015 should have been scrutinised by the appellant who should have realised its significance to its business. That Bulletin would have alerted a reasonable taxpayer to the changes in the law and their importance. A reasonable taxpayer conscious of its obligations to the tax system would then have undertaken further research to ensure that it complied with the new rules.

60. The appellant also cites the advice that Robert Thornton was given over the telephone by an HMRC officer to the effect that there was no need for the appellant to file the returns. However, given that this telephone call was in February 2017, so sometime after the due filing dates, this advice cannot comprise an excuse for late filing. Indeed, Mr Thornton did not appear to accept it and filed in any event.

61. And so in these circumstances we find that the appellant has no reasonable excuse based on ignorance of the law.

Proportionality

62. The appellant also argues that the penalties are disproportionate.

(1) In relation to the doctrine of proportionality and its application to the issues in this case, we have reviewed the following cases:

(a) Paraskevas Louloudakis v Elliniko Dimosio (Case C-262/99) [2001] ECR I-5547 ("*Louloudakis*")

(b) International Transport Roth GmbH v Secretary of State for the Home Dept [2003] QB 728 ("*Roth*")

(c) James v UK (Application 8793/79) (1986) 8 EHRR 123 ("*James*")

(d) Wilson v SoS for Trade and Industry [2003] UKHL 40 [2004] 1AC816 ("*Wilson*")

(e) R(on the application of Lumsden and others) (Appellants) v Legal Services Board (Respondent) [2015] UKSC 41 ("*Lumsden"*)

(2) A summary of the principles relating to proportionality is set out below:

(a) Proportionality as a general principle of EU law involves a consideration of two questions: first, whether the measure in question is suitable or appropriate to achieve the objective pursued; and secondly, whether the measure is necessary to achieve that objective, or whether it could be attained by a less onerous method (*Lumsden* at [33])

(b) As is the case for other principles of public law, the way in which the principle of proportionality is applied in EU law depends to a significant extent upon the context (*Lumsden* at [23]).

(c) In the context of its application to penalties, the principle of proportionality is that:

(i) penalties may not go beyond what is strictly necessary for the objective pursued; and

(ii) a penalty must not be so disproportionate to the gravity of the infringement that it becomes an obstacle to the freedoms enshrined in the Treaty (*Louloudakis* at [67]).

(d) In deciding whether the measures or their application is appropriate and not disproportionate, the court must exercise a value judgment by reference to the circumstances prevailing when the issue is to be decided. It is the current effect and impact of the legislation which matters, not the position when the legislation was enacted or came into force (*Wilson* at [62]).

(e) The margin of appreciation given to law makers in implementing social and economic policy should be a wide one and the courts will respect the law makers judgment as to what is in the public interest unless that judgment is manifestly "without reasonable foundation" (*James* at [46]) or "not merely harsh but plainly unfair" (*Roth* at [26]).

63. Unfortunately for the appellant we do not believe that these penalties are disproportionate. To be so they must be “without reasonable foundation” or “not merely harsh but plainly unfair”. They are neither.

64. HMRC have already reduced the penalties from their statutory maxima of £3,000 for each penalty down to £250, £500 and £1,000.

65. The fact that they are not tax geared simply means that Parliament intends them to apply in order to encourage good behaviour. That behaviour is to ensure that returns are submitted on time irrespective of whether there is any tax to pay. It is purely a reporting obligation to enable HMRC to check up on self-employed individuals who are introduced by the "employer". This is, admittedly, another administrative burden imposed on a small employer who will get no compensation for undertaking it. But the penalty regime is designed to encourage compliance and failure to do so, and the penalties therefore, are neither disproportionate to the end that they seek to achieve nor in the amounts in which they have been determined.

Section 100B TMA 1970

66. The employment intermediary returns are special returns under section 98 TMA 1970 and the penalties are not of a particular amount. They are of an amount "not exceeding [£3,000]”. This brings them within the ambit of section

100B(2)(b)(iii) TMA 1970. This provision gives the tribunal the power to reduce a penalty if it considers that penalty to be excessive. We intend this exercise this power and reduce the penalties for the following reasons:

(1) There is no evidence that any tax has been lost as a result of the appellants' failure to submit the returns on time.

(2) Although the amount of the penalties are not disproportionate, they are of a high amount for a small business.

(3) There is no suggestion that the appellant has anything other than an unblemished tax track record.

(4) It complied with its obligation to file as soon as it became aware of the need to do so - indeed in the face of oral advice from an HMRC officer that there was no need to do so.

(5) It has learned its lesson. Even though it is now outside the regime as it has no self-employed individuals on its books, it is our view that the appellant would undoubtedly comply with the reporting regime if it once again came within it. So this experience (rather than the amount of penalties) has, we believe, led to a change in behaviour.

67. Indeed it our view that it is likely that the appellant will now be more diligent towards its general tax obligations in the future than would otherwise have been the case. So the imposition of the penalty has had its desired effect.

68. And this is irrespective of its amount. The penalty regime should not be a revenue raiser, it should be designed to influence behaviour and we believe that it has done so.

69. And so for these reasons, if we are wrong to allow the appeal on the basis that HMRC have failed to establish that they have made a valid section 100 TMA 1970 determination, we would reduce the penalties for each period to £250 (i.e. a total of £750).

Decision

70. We allow this appeal.

Appeal rights

71. 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

72. “Guidance to a Company a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

RELEASE DATE: 1 October 2018