[2018] UKFTT 640 (TC)

TC06788

Appeal number: TC/2018/04237

INCOME TAX – employment intermediaries returns - penalties for failure to file nil returns for two periods after filing of first return with information – whether officer of HMRC made penalty determinations – whether ignorance of requirement to file nil returns reasonable excuse – whether reliance on third party reasonable excuse – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

TARRANT HOWL LTD	**Appellants**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: JUDGE RICHARD THOMAS

The Tribunal determined the appeal on 22 October 2018 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 30 June 2018 (with enclosures) and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 9 August 2018.

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DECISION

1. This was an appeal by Tarrant Howl Ltd ("the appellant") against two determinations made by an officer of the respondents ("HMRC") under s 98 Taxes Management Act 1970 ("TMA") for the appellant's failure to deliver two returns under regulation 84F Income Tax (Pay As You Earn) Regulations 2003 (SI 2003/2682) ("PAYE Regulations").

Facts

2. HMRC's records show that on a date before 14 March 2018 Tarrant Howl Ltd ("the appellant") was issued with a notice of determination of a penalty informing them that a penalty of £250 had been assessed for their failure to file a return under regulation 84F PAYE Regulations.

3. The returns for the three months ("quarter") ended 5 October 2017 (Q2) and that for the quarter ended 5 January 2018 (Q3) were delivered on 15 February 2018.

4. On 5 March 2018 the appellant wrote to HMRC giving their notice of appeal against the penalty determination of £250.

5. On 14 March 2018 HMRC wrote to the appellant to say that the penalty determination previously issued for £250 had been withdrawn, and that two new determinations would be issued for Q2 and Q3. The letter invited further information.

6. On 16 March 2018 HMRC's records show that the appellant was issued with a notice of determination of a penalty of £250 for their failure to file a return under regulation 84F PAYE Regulations in respect of Q2 by the due date of 5 November 2017.

7. Also on 16 March 2018 HMRC's records show that the appellant was also issued with a notice of determination of a penalty informing them that a penalty of £500 had been assessed for their failure to file a return under regulation 84F PAYE Regulations in respect of Q3 by the due date of 5 February 2018.

8. On 4 April 2018 HMRC wrote to the appellant in response to the letter of 5 March 2018 notifying their appeal and said that in the officer's (John Weaver's) opinion the appellant had demonstrated no reasonable excuse for filing late. That was because an reasonable excuse could only exist where an unexpected or unusual event, either unforeseeable or beyond their control, prevented the appellant from sending their return in on time. He added that "we will consider the facts of each case" (presumably to see if there was an unusual etc event). The letter went on to say that the appellant could provide further information, ask for a review or notify the Tribunal.

9. On 20 April 2018 the appellant responded stating that they would like to appeal against the two "fines" they had incurred and giving reasons.

10. On 4 June 2018 HMRC gave the conclusions of a review of HMRC's determination of the penalties for Q2 and Q3. The conclusion was that the decision to charge the penalties was correct.

11. On 30 June 2018 the appellant notified appeals against penalties of £750 to the Tribunal.

The law

12. The law imposing these penalties is in Part 5 of the PAYE Regulations. The power to make them was enacted by s 18 Finance Act ("FA") 2014 which inserted a section 716B into the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA"). Section 716B reads:

> "**716B Employment intermediaries to keep, preserve and provide information etc**
>
> (1) For purposes connected with Chapter 7 of Part 2 (treatment of workers supplied by agencies) or Part 11 (PAYE), the Commissioners for Her Majesty's Revenue and Customs may by regulations make provision for, or in connection with, requiring a specified employment intermediary—
>
> (a) to keep and preserve specified information, records or documents for a specified period;
>
> (b) to provide Her Majesty's Revenue and Customs with specified information, records or documents within a specified period or at specified times.
>
> (2) An "employment intermediary" is a person who makes arrangements under or in consequence of which—
>
> (a) an individual works, or is to work, for a third person, or
>
> (b) an individual is, or is to be, remunerated for work done for a third person.
>
> (3) For the purposes of subsection (2), an individual works for a person if—
>
> (a) the individual performs any duties of an employment for that person (whether or not the individual is employed by that person), or
>
> (b) the individual provides, or is involved in the provision of, a service to that person.
>
> (4) In subsection (1) "specified" means specified or described in regulations made under this section.
>
> (5) Regulations under this section may—
>
> (a) make different provision for different cases or different purposes, and
>
> (b) make incidental, consequential, supplementary or transitional provision or savings."

13. The first regulations made under the powers in s 716B ITEPA were the Income Tax (Pay As You Earn) (Amendment No 2) Regulations 2015 (SI 2015/171) which inserted regulations 84D to 84H into the PAYE Regulations. In what follows a reference to a regulation by one of the numbers in the range mentioned is to that numbered regulation of the PAYE Regulations. Regulations 84D to 84H state, so far as applicable to the provision to HMRC of information:

> "*84E Specified employment intermediaries*
>
> An employment intermediary is a specified employment intermediary if at any time during a tax quarter—
>
> (a) the employment intermediary is an agency;
>
> (b) more than one individual provides services to a client under or in consequence of a contract between the employment intermediary and one or more clients;
>
> (c) those services are not provided exclusively on the United Kingdom continental shelf; and
>
> (d) the employment intermediary makes one or more payments in respect of, or connected with, the services provided by one or more individuals that—
>
> (i) is required by regulation 67B to be included in a return delivered to HMRC by the employment intermediary when the payment is made but has not been ("a reporting failure"); or
>
> (ii) is not required by regulation 67B to be included in a return delivered to HMRC by the employment intermediary when the payment is made because the individual is not an employee or treated as an employee under regulation 10 ("no reporting requirement").
>
> *84F Returns by specified employment intermediaries*
>
> (1) A specified employment intermediary must, for each tax quarter, provide to HMRC the information specified in regulation 84G no later than the end of the tax month following that quarter.
>
> (2) The information must be included in a return in a form prescribed by HMRC and include a declaration that the information provided in the return is correct and complete to the best of the knowledge and belief of the person completing it.
>
> (3) The return is to be made using an approved method of electronic communication.
>
> (4) The return may be amended until the end of the tax month following the tax quarter after the tax quarter to which the return relates.
>
> (5) Where a return is made in relation to a tax quarter, the specified employment intermediary shall continue to provide a return to HMRC in relation to every subsequent tax quarter until either—
>
> (a) regulation 84E(b) to 84E(d) has not been satisfied for 4 consecutive tax quarters in respect of the specified intermediary; or

(b) the specified employment intermediary notifies HMRC that it is no longer an employment intermediary.

84G Specified information

The specified information is—

5 (a) in respect of the specified employment intermediary making the return its—

(i) name;

(ii) address;

(iii) postcode;

10 (iv) employer's PAYE reference number where it is required to have one;

(b) in respect of each individual providing the services referred to in regulation 84E—

(i) the individual's—

15 (aa) name;

(bb) address;

(cc) postcode;

(dd) national insurance number (if the individual has one) or gender and date of birth (where the individual 20 does not have a national insurance number);

(ee) Unique Taxpayer Reference issued by HMRC (if self-employed or a member of a partnership);

(ii) the date on which the individual began providing the services referred to in regulation 84E;

25 (iii) the date (if any) on which the individual stopped providing the services referred to in regulation 84E; and

(c) where a payment is made to an individual in respect of, or in connection with, the services referred to in regulation 84E, but that payment is not included in a return delivered to HMRC under 30 regulation 67B at the time the payment was made because there is no reporting requirement or there is a reporting failure—

(i) the full name (or if a partnership the name under which they trade) and address of the person receiving the payment made by the specified employment intermediary (if not the same as 35 in 84G(b)(i)(aa) and (bb));

(ii) the total of the payments made by the specified employment intermediary to the person in the tax quarter;

(iii) the reason why the specified employment intermediary has not deducted income tax from those payments;

40 (iv) where the reason for the non deduction given in (iii) is that the payments made are to a limited company the full name of

the company and company registration number of that company; and

(v) whether the payments included amounts in respect of Value Added Tax."

5 14. The regulations came into force on 6th April 2015 and have effect in relation to tax quarters beginning on or after that date.

15. Section 18(2) to (5) FA 2014 provides for the penalty regime for failure to provide information etc. to HMRC. It does this by amending s 98 TMA so that it reads relevantly as follows:

10 "**98 Special returns, etc**

(1) Subject to the provisions of this section and section 98A below, where any person—

…

(b) fails to furnish any information, give any certificate or produce
15 any document or record in accordance with any of the provisions specified in the second column of the Table below,

he shall be liable, subject to subsections (3) and (4) below—

(i) to a penalty not exceeding £300, and

(ii) if the failure continues after a penalty is imposed under
20 paragraph (i) above, to a further penalty or penalties not exceeding £60 for each day on which the failure continues after the day on which the penalty under paragraph (i) above was imposed (but excluding any day for which a penalty under this paragraph has already been imposed).

25 …

(3) No penalty shall be imposed under subsection (1) above in respect of a failure within paragraph (a) of that subsection at any time after the failure has been remedied.

(4) No penalty shall be imposed under paragraph (ii) of subsection (1)
30 above in respect of a failure within paragraph (b) of that subsection at any time after the failure has been remedied.

…

(4F) If a person fails to furnish any information or produce any document or record in accordance with regulations under section 716B
35 of ITEPA 2003, subsection (1) has effect as if—

(a) for "£300" there were substituted "£3,000", and

(b) for "£60" there were substituted "£600".

Table

1 2

Regulations under section 716B of ITEPA 2003.

PAYE regulations."

16. Penalties under section 98 are governed by sections 100 to 103 and 118 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—

…

(c) section 98(1) above as it has effect before the amendments made by section 164 of the Finance Act 1989 or section 98(1)(i) above as it has effect after those amendments, *subject to subsection (2A)*, …

…

(2A) Subsection (2)(c) does not exclude the application of subsection (1) where the penalty relates to a failure to furnish any information or produce any document or record in accordance with regulations under section 716B of ITEPA 2003 (employment intermediaries to keep, preserve and provide information etc).

(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.

…"

The italicised words were inserted by s 18 FA 2015 with effect from 23 March 2015.

"**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—

…

(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.

118 Interpretation

…

(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 ...

…"

17. Finally, as to legislation it should be noted that s 16 FA 2014 made comprehensive changes to the taxation of workers using agencies and of the agencies. It substituted a new s 44 ITEPA and inserted s 46A into that Act. The effect of the new s 44 was to put on agencies the burden of operating PAYE on those workers they place with clients, subject to exceptions, while s 46A is an anti-avoidance provision to stop circumvention of s 44. These changes came into force on 6 April 2014. Before then it was the client which had the responsibility to operate PAYE on workers supplied by agencies.

18. Some further analysis of all this legislation is required. First, it seems clear from, in particular, s 716B(3) ITEPA that a "worker" does not have to be employed by the client, but may be providing personal services amounting to the carrying on of a trade.

19. Second, an agency is not a specified employment intermediary ("SEI") for the purposes of regulation 84E if it only supplies one individual to a client in a tax quarter (which means the quarter ending 6 July, October, January and April in each tax year) – regulation 84E(b). Nor is it an SEI if all the payments all clients make to all workers fall within the scope of PAYE and an RTI (Real Time Information) PAYE submission

in respect of the workers is made, presumably by the agency as a result of s 44 ITEPA (as substituted by FA 2014).

20. The return required by regulation 84F of an SEI is of information, not of amounts of tax deducted, is made for a quarter and must be provided by the end of the following tax month, ie for a quarter ended on 5 July by 5 August. But a return may be amended at any time up to the end of the fourth tax month after the end of the quarter, ie in such a case up to 5 December.

21. Once one return has been made, then it seems returns must continue to be made by an SEI for following quarters even if there is no relevant information to report ("a nil return") – regulation 84F(5). This making of nil returns is to continue until there have elapsed four quarters where nil returns were required or, if earlier, the agency notifies HMRC that it is no longer a SEI. The precise implications of this paragraph are considered below.

22. As to the penalty provisions, FA 2014 made two important modifications to s 98 TMA. It increased the maximum penalties tenfold where the failure is to supply information under regulation 84F PAYE Regulations and it made an exception from the normal rule that an initial penalty for failure cannot be determined by an officer of Revenue and Customs but must instead be begun by instituting proceedings before the Tribunal. Thus in the case of such an initial penalty there is a choice for HMRC: they may make a determination or may institute proceedings.

23. The only other case in s 98 TMA, which covers a vast number of failures to provide information or other returns, where the penalty is ten times the normal rate is where a quarterly return by a company of interest and other payments paid under deduction of tax is required – s 98(4A) TMA.

24. Section 100B(2)(b) TMA, rather than paragraph (a), applies in this case because the penalty is not a fixed penalty but one with a maximum. The Tribunal may therefore cancel, confirm, reduce or increase the penalty.

25. In their statement of case ("SoC") HMRC say that "the amount of the penalty is based on the number of offences in a 12 month period" and is £250 for a first offence, £500 for a second and £1,000 for a third or fourth. They do not point to any directions by the Commissioners or any policy statement laying down these figures.

26. No penalties arise if the appellant had a reasonable excuse for the failure to file the return by the due date, so long as, if the excuse ceased, the failure was remedied within a reasonable time. There is no other qualification of "reasonable excuse" as there is in eg Schedule 55 FA 2009.

27. No reduction may be made by HMRC, or reviewed by the Tribunal, on account of special circumstances, but any penalties may be mitigated at any time by the Commissioners under powers in s 102 TMA, but such a decision to, or not to, mitigate is not reviewable by this Tribunal.

Grounds of appeal

28. In his letter of appeal 5 March 2018 Mr Stewart Howl, a director of the appellant, says that he runs an independent recruitment consultancy and is the sole employee of the business. Most of what he does is the placing of people on a permanent basis into new jobs but occasionally clients require freelance staff, and he uses a third party factoring company to finance this.

29. That company provides intermediary reports to him and he had only received one (for Q1) which he duly filed. After that one he hadn't had any freelance workers who required declaring in a report and he had no idea that he had to notify HMRC if he had nothing to report. He assumed that like VAT if a report was required he would be notified. He considered a £250 fine unreasonable.

30. In his second appeal on 20 April 2018 against the two 16 March determinations he set out his grounds in bullet point form:

- The fines were disproportionate to the mistake.
- HMRC lost no revenue.
- All "actual" (ie not "nil") reports he had to submit were filed on time and were correct.
- He was not aware of the need to file nil returns.
- HMRC did not inform him of his mistake until after the second error.
- The reports were sent to him by a third party payroll company.
- The company is the first business he has run, with a small turnover and he had been fully compliant in every other aspect.

31. The grounds in the Notice of Appeal to the Tribunal repeated and emphasised many of the previous points.

HMRC's response

32. HMRC say in response that:.

(1) The return for Q2 was late and so the appellant was liable to a penalty of £250.

(2) The return for Q3 was late and so the appellant was liable to a penalty of £500.

(3) The new legislation introduced through s 716B ITEPA took effect from April 2015 and was well documented on HMRC's website, and all relevant guidance has been publicised on the Gov.uk website, stating the process, timelines and what penalties would be charged if the return is late. It is the

"customer's" duty to make themselves familiar with the regulations, and the duty is not complicated.

(4) Penalties were suspended for the first year (the year to 5 April 2016) to allow familiarisation. The appellant was enrolled for the Employment Intermediary ("EI") Service on 6 April 2017 and submitted their first return on time, so HMRC "would expect the employer to be aware" of their obligation etc to file each quarter. I interpolate here to say that I interpret the words in quotes as actually meaning that HMRC would have expected the appellant "to have been aware", otherwise it looks as if HMRC are making the illogical assumption that because there was a familiarisation period that ended before the appellant enrolled, they would be aware of its obligations.

(5) The appellant cannot transfer responsibility to a third party for ensuring their obligations are met.

(6) The information on the Gov.uk website "clearly shows [that] where you have not supplied workers in a specific quarter, you must file a nil report by the deadline" and "It is important to file a nil return and failure to comply creates unnecessary burdens for both the customer and HMRC".

(7) "We all make mistakes", but this was not a blameworthy one.

(8) Ignorance of the law may be a reasonable excuse, but HMRC do not believe that the regulations fall into the category of complex legislation that may merit such a conclusion.

(9) A penalty can't be cancelled merely because the appellant is not in a position to pay it.

(10) The penalties for failing to lodge a nil return (not a nil "tax" return as the SoC has it) are not harsh and certainly not plainly unfair. An unnamed decision of the Upper Tribunal found that a penalty cannot be cancelled because it is unfair.

(11) The appellant has not claimed a reasonable excuse for its late filing.

33. HMRC also add that they realise (citing *Christine Perrin v HMRC* [2018] UKUT 156 (TC)) that the letter of 4 April 2018 was incorrect in limiting the possible reasonable excuses that HMRC would accept to those set out in §8. They have reviewed that case in the light of *Perrin* but have found no reason to change the review conclusion.

Discussion

Validity of penalties

34. In *Robert, Adam and Dorothy Thornton trading as A* Education v HMRC* ("*A**") [2018] UKFTT 568 this Tribunal (Judge Nigel Popplewell and Norah Clarke) held that, on the basis of the Upper Tribunal decision *Burgess and anor v HMRC* [2015] UKUT 578 and other cases, the Tribunal was entitled, in a case where HMRC had the burden of proof, to consider the validity of the penalty assessment. In *A** the penalties (there were three) were ones under regulation 84F PAYE Regulations as in this case.

35. The Tribunal considered in detail (at [22]) the meaning of s 100(1) TMA and concluded that it required a "real officer", not a computer, to make the determination.

36. In *A** the tribunal issued directions requiring 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."

37. The Tribunal said at [26] of the reply from HMRC:

> "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."

Accordingly the Tribunal decided the penalties were invalidly determined.

38. I respectfully agree fully with this decision. It is one I have reached in relation to other penalties to which s 100 applies, namely the late filing penalties for corporation tax in Schedule 18 FA 1998 and to late filing penalties for stamp duty land tax where the relevant provision is a copy of s 100 TMA.

39. There are further pointers to *A** being correct. The Tribunal could have gone on to point out that what is also required is that the determination sets the penalty at such amount as, "*in his opinion*", is correct. That cannot be the computer's opinion or that of any high level committee of HMRC, even if computers and committees can form opinions.

40. And lest HMRC seek to argue that the reference to an officer was a hang over from pre-computer days and should not be taken literally, I point out that in the Explanatory Notes for s 18 FA 2015 (which modified s 98 TMA after HMRC realised that they had not done the full job in FA 2014) say:

> "3. … New subsection (2A) provides that penalties in relation to an intermediaries return do not appear in the list of exceptions to section 100 TMA 1970 contained in section 100(2) TMA 1970. This means that penalties in relation to the failure to keep, preserve and provide information in the employment intermediaries return required under s716B of the Income Tax (Earnings and Pensions Act) 2003 ("ITEPA") *can be issued by an Officer of the Board* and do not require proceedings before the First Tier-Tribunal." [My emphasis]

41. The tribunal in *A** hinted at s 113 TMA being of potential assistance to HMRC. It may be that it was s 113(1D) TMA they had in mind. This subsection allows an officer who has decided to impose a penalty and taken all other decisions needed to arrive at the amount to entrust another officer with the mechanical task of inputting figures and other details (if that is necessary) and to entrust a computer with issuing the notice of determination. This, or rather the assessment equivalent, s 113(1B) TMA,

was prompted by the case of *Burford v Durkin (HM Inspector of Taxes)* 63 TC 645 (1990) where the processes were challenged. It does not remove the necessity for an officer to make a decision and to form an opinion about the amount.

42. In a case where a point is raised by the tribunal which was not included in the grounds of appeal, I would normally seek submissions from HMRC on it. In the light of what is said in *A**, my view is that it is unnecessary to do so in relation to the original penalty assessment of £250, the one referred to in Mr Weaver's letter of 14 March 2018. While there is no evidence in the bundle of this penalty being determined and notified except the appellant's letter of 5 March, there is no doubt in my mind that it was issued after 15 February 2018 as this is consistent with the appellant appealing it on 5 March and with what Mr Weaver says in his letter of 14 March 2018.

43. This raises doubts in my mind as to whether that determination was made automatically on the same basis as those in *A**. The HMRC response to the *A** Tribunal from HMRC says that penalty determinations are made and issued automatically one month after the due date for a quarter. For Q2 that is 5 December 2017. If the initial penalty determination for £250 was for Q2 why then was it not made shortly after 5 December 2017?

44. The story that follows is very unclear. Mr Weaver said in his letter of 14 March 2018 that he withdrew and replaced the £250 penalty, and indeed two determinations appear on HMRC's PAYE and EI records for the appellant as having been made on 16 March 2018, with nothing having been made and issued before 14 March.

45. It seems Mr Weaver withdrew the first determination for £250 and made two more because, as he says in that letter, it was not noticed by HMRC that the appellant had on 15 February 2018 filed two nil returns, for Q2 and Q3, and HMRC thought there was only one and so made one determination at £250.

46. But this does not explain why Mr Weaver wished to withdraw the £250 penalty, unless it was actually stated to be for Q3 and so should be for £500. That it was a Q3 penalty can be inferred from the date it was made, about the time that HMRC say they are made automatically (see §43). Assuming it was for Q3 then what Mr Weaver proposed was understandable but wrong in law. He was overlooking s 100(4) TMA:

> "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."

47. Mr Weaver altered it by reducing it to nil. It seems clear from his letter that he was not withdrawing it "on appeal", because that would imply he accepted that the appellant's appeal should succeed. He said that he would consider the appeal later (though why he would wish to do that if he had withdrawn the penalty is not clear). Therefore the purported withdrawal has no effect.

48. What he should have done in March 2018 (again on the assumption that the initial determination was for Q3) was to determine Q2 in the amount of £250 and he should then have sought to determine the original Q3 determination in the sum of £500, and in

the absence of a s 54 TMA agreement to this course of action, he should have left it to the Tribunal to do so under s 100B(2)(b)(iv) TMA.

49. It follows that the original £250 determination was for Q3 and has not been validly withdrawn. But in the light of the date it was made I think it can be cancelled as not having been determined by an officer of the Board.

50. But what of the two later notices of determination of £250 (for Q2) and £500 (for Q3)? The records show those as having been made on 16 March 2018. What I do not know for certain is whether Mr Weaver made those determinations within the meaning of s 100(1) TMA. I have no doubt, based on the procedure for making other penalties, that there can be a manual or clerical determination outside the automatic computer run. The evidence I have from HMRC persuades me that it is more likely than not that the 16 March 2018 determinations were made by an officer of Revenue and Customs (Mr Weaver) and cannot be cancelled on the basis that they were made automatically and without human input. They have been appealed against.

51. I did entertain doubts at one point about whether HMRC could make a second penalty determination for Q3 at all or if they can whether they could make it in the sum of £500, having already made one for £250. Whatever the position where the first determination remains undetermined, this is not however such a case as I have held that the first assessment is invalid. Any doubts are irrelevant.

52. I therefore need to consider the points raised by the appellant in his appeals.

Ignorance of the need to file nil returns.

53. In terms of ignorance of the law this is a confession that the appellant was unaware of what regulation 84F(5) required to be done. He blames HMRC for not warning him.

54. HMRC in turn say that the information on the Gov.uk website "clearly" shows that an agency must file a nil report. They have attached two extracts from the website to the SoC. The first "Employment status: employment intermediaries" has a sub-heading "Reporting requirements for employment intermediaries who don't need to operate PAYE". This does not refer at all to nil returns but links to another page which is not attached.

55. A further item from the Gov.uk site is given headed "What this (*sic*) means for an intermediary." A not entirely simple search for these words on Gov.uk brings up a hit for "Reporting requirements for employment intermediaries" which I think is the page linked to the subheading "Reporting requirements for employment intermediaries who don't need to operate PAYE" referred to in the previous paragraph.

56. The site I found from that link contains a number of further links starting with "Why this legislation was introduced" and then "What this means for intermediaries" and "What this means for an agent". I looked at the intermediary one as this is the one HMRC have included. The "agency" one (and the appellant is an agency) says nothing about the regulation 84F returns, but is concerned solely with s 44 ITEPA.

57. The first point to note is that the "What this means for intermediaries" webpage's opening statement is that intermediaries must return details of all workers they place with clients where they don't operate PAYE on the workers' payments. This applies to the appellant.

58. It then says that the webpage is not for those who only *introduce* workers to clients and do nothing thereafter, ie there is a qualification of the opening statement. What the appellant says in §26 suggests that introduction is their main business. It is not clear that what they do with freelance workers is to supply them or merely introduce them. In the absence of any obvious answer I assume they supply them which is why they thought it necessary to enrol as an SEI, so the opening statement still applies to them.

59. The first numbered section (1) following the opening statement as qualified sets out a paraphrase of regulation 84E. My only quibble with it is that it says it applies if "you … are an agency or intermediary that supplies the services of individuals to clients". Regulation 84E(a) refers only to "agency". "Agency" is defined in regulation 2 PAYE Regulations to have the same meaning as it has in s 44 ITEPA. There an agency is a person who supplies the services of an individual to another person (the client) where that individual (there called "the worker") personally provides services to the client, which seems to cover the filed of the intended targets. But whatever "intermediary" who is not an agent is intended to mean "agency" does at least seem to cover the appellant in relation to their workers supplied.

60. The next paragraph in section 1 is a statement:

> "Where you have not supplied workers in a specific quarter, you must file a 'nil report' by the deadline date."

61. This seems clear at first glance, but I do not think it is. Clearly "workers" in this paragraph and those before it embraces all workers, those for whom the agency operates PAYE and those for whom it doesn't. If it didn't mean that, then the opening statement would not have excluded from relevant workers those where PAYE is operated on their earnings. This follows the pattern in regulation 84E.

62. This paragraph about nil reports can be read as saying that a nil report is only required if there are no workers of any type, PAYE or non-PAYE, who have been supplied. But this not what regulation 84E(5) seems to say.

63. But there is much more to section 1 after this "nil reports" paragraph. I have numbered the paragraphs for ease of reference:

> "(1) If you supply workers to the intermediary that has the contract with the client, you don't have to send a report. You'll have to provide details of the workers you supply to the intermediary with the contract.
>
> (2) These conditions can include situations where you:
>
> - supply both workers and materials
> - supply different, and/or substitute workers

(3) You must provide details about workers and their engagements. This includes engagements they are working on and those that ended in the reporting period you're sending a report for.

(4) If you pay the worker in a different period to when they worked, you can either include their details on the report about the period:

- they worked in - if it's before the deadline for sending your report
- the payment was in and leave 'End date of engagement' blank

(5) You must provide the worker's details and payment details for workers where you don't operate PAYE. This includes:

- overseas workers, who have to pay tax in the UK
- payments where the worker is working in the UK or working temporarily abroad overseas
- Construction Industry Scheme workers where workers are supplied to an end client - the gross payment before any deductions, including any VAT

(6) You must provide a report for each reporting period unless you:

- supply workers' services at sea in the oil and gas industry wholly on the UK continental shelf
- don't provide more than one worker's services to a client or make one or more payments for services for an entire year
- tell HMRC you are no longer an employment intermediary

(7) You don't have to include details of workers who:

- don't have to pay tax in the UK
- are your own employees
- you don't find work for in a period or who aren't paid during a period
- provide their services entirely from their own home or premises not managed by the client - unless they have to because of the services and work they provide to the client
- are actors, singers, musicians, other entertainers, or a fashion, photographic or artist model

(8) You don't have to include payment details where they have already been included as part of a payroll submission by any other organisation.

(9) Where your business is no longer an intermediary, you must tell HMRC.

(10) You can both submit a completed report and tell us you have stopped being an intermediary in the same quarter.

(11) You can access forms which allow you to:

- upload a report

- upload a nil report
- advise you are no longer an intermediary

by scrolling through the screens when using the reporting template.

5 64. I interpret (1), with examples in (2), as a case where no report at all is required to be made to HMRC, but this does not so far as I can see apply to the appellant.

65. Logically, as there is nothing like "In all other cases …" or "Where you don't supply workers to an intermediary …" at the start of (3), it could confuse a reader into thinking that it applies to the case in (1). But I think it does not apply for case (1), and 10 that (3) to (11) apply where (1) does not and so could apply to the appellant.

66. (3) is what the appellant did for the quarter to 5 July 2017, his first quarter (Q1), and (4) is further information about (3) showing in which report to put information.

67. (5) seems to me to be what the appellant did in Q1.

68. (6) is the one that seems to be crucial. The second bullet (6.2) says that a person 15 does not have to make a return if (a) they only provide one person's services or (b) they don't make any payments for services for a whole year. (6.3) says they do not have to make a report if they are no longer an employment intermediary.

69. (6.2)(a) is what regulation 84E(b) says. (6.2)(b) seems to be a gloss on regulation 84F(5)(a). (6.3) is it seems to me a gloss on regulation 84E as a whole, although that 20 regulation defines an SEI, not an employment intermediary in general. No definition of "employment intermediary" in general or of SEI is shown on the webpage.

70. (7) is an exclusion from a report that is otherwise required to be made. The relevant one for the appellant is the second bullet. It is far from clear whether that means only people who are employed by the agency under an actual contract of 25 employment or also includes those for whom the agency must operate PAYE because it is deemed by s 44 ITEPA to be the employer. The reference to "workers" suggests it means the latter only, which is consistent with regulation 84E(d) read with regulation 84E(b).

71. (8) is not relevant.

30 72. As to (9) I can see no legislative requirement for this to be done, at least so far as ceasing to be an SEI as distinct from an agency generally is concerned.

73. But nothing in this mass of information from (1) to (10) refers specifically to a nil report. The nearest it comes is the second bullet of (6). But (11) does refer to a nil report but only to say that there is a form which can be accessed from the reporting 35 template screen.

74. (11) is followed by a link to a page telling SEIs how to use that template. That page does not however refer to a nil report. I can on the "how to use" webpage look at the template itself, but what appears does not mention a nil report.

75. Sections 2 and 3 of the "What this means for an intermediaries" webpage (§57ff) does not refer to nil reports. Section 4 (Deadlines and penalties) informs an SEI that:

> "You can select and remove a report after you have sent it. You can also upload and send more reports if you need to. You must do this before the next period's deadline.
>
> If you remove all reports after a period's deadline when the original deadline has passed and the period doesn't have a report, you may receive a penalty for a late report, unless you:
>
> - upload and send a new report (or reports)
> - send a NIL (sic) report
> - tell HMRC you are no longer an intermediary."

76. Section 4.2 sets out the rate of penalty, as shown in §25. It also says that continued failure to send reports, or where reports are frequently sent in late, may lead to daily penalties of up to £600 a day.

77. Finally the page refers at the end to HMRC's Employment Status Manual and tells SEIs to read ESM 2029. That paragraph of the manual is an index listing the topics covered by each of ESM 2030 to 2068. The only one that appears at all relevant is EM 2042 headed "Agency and temporary workers: agency legislation - provisions from 6 April 2014: record-keeping and returns (6 April 2014 onwards)". The only relevant part says:

> "There is an associated [to the record-keeping requirement] returns requirement. Returns must be made to HMRC on a quarterly basis and the first returns must be filed with HMRC by 5 August 2015. There is no requirement to make a return for any worker for whom income tax and NICs have been accounted for correctly under RTI."

78. However there is a paragraph of ESM which does cover reporting in detail, even though it is not referred to in the webpage considered above. It is EM 2138 which says:

> "Accessing the Online Service with an Employers Reference and Accounts Office Reference:
>
> The intermediary service will appear in a list of services you can use and can be selected to upload the return.
>
> At the HMRC service login stage
>
> [this is left intentionally blank to reflect the webpage]
>
> The details that are provided and selected during the login stage will be associated with the template automatically by HMRC to save repeating them in the template
>
> The details are:
>
> 1. The PAYE and Accounts office references

> 2. The selected reporting period (quarterly to the 6th July, October, January and April).
>
> 3. A nil return option - The specified employment intermediary must notify HMRC if they do not have any workers to report in a quarter. This is done by selecting the NIL return option from the login screen. This will stop any late filing penalties from being issued. The specified employment intermediary will not need to upload a separate NIL return once they have selected the NIL return option.
>
> 4. A Permanently Ceased Option - The Specified employment intermediary must notify HMRC if they have permanently ceased to operate as a specified intermediary. This should be indicated by selecting 'Y' on the appropriate screen, otherwise by default it will be displayed as 'N' and HMRC will continue to expect to receive quarterly reports."

79. I have deliberately set all this out because of what HMRC say at §32(6) that

> "The information on the GOV.UK website *clearly* shows [that] where you have not supplied workers in a specific quarter, you must file a nil report by the deadline" [My emphasis]

80. As someone who has just examined the legislation and the ESM as well as the information on the Gov.uk website I have found the only passage that purports to explain the circumstances in which a nil report is required, numbered paragraph (6) in §64, more than a little impenetrable. It has two negatives "you must … unless" and "don't" and alternatives, (a) and (b), where I am still not clear if the final words about a year relate to both alternatives or only (b).

81. I am used to construing complex law and I am reasonably, but not wholly, confident that the effect of regulation 84F(5) is that nil returns were required for Q2 and Q3. But I am not the kind of person the web guidance is aimed at: the appellant (and their payroll agency) is. Mr Howl did not read it, but had he done so I do not think he would clearly understand that he had to send nil returns for Q2 and Q3. It would be perfectly reasonable for any SEI looking at the words:

> "Where you have not supplied workers in a specific quarter, you must file a 'nil report' by the deadline date."

to think that it only applied where they had no workers to supply, whether PAYE was operated on their pay, as is the norm for agency workers by virtue of s 44 ITEPA and regulation 10 of the PAYE Regulations, or not.

82. And I think that what I have said above shows that it is not immediately obvious how someone with no tax knowledge would even find the webpages that HMRC refer to, whether or not they are clear.

83. In my view for these reasons, invisibility and complexity of the webpages, the appellant had a reasonable excuse for the failure to file the returns by 30 November and 28 February respectively.

Reliance on a third party

84. In the appellant's grounds of appeal are statements that they relied on a third party payroll company to provide them with reports, and that they did so for Q1. They do not actually say that they expected the third party to tell them that a nil report must be filed, but that is the strong inference I draw.

85. Section 118(2) allows for a reasonable excuse to nullify the consequences of a failure to do something within a provision of TMA, here the failure referred to in s 98 TMA. It is unqualified except as to the necessary action required if the excuse it provides for ceases. In particular it does not contain the outright prohibition of reliance on a third party that is found in s 71(1)(b) Value Added Tax Act 1994 or the more nuanced and qualified one in more modern penalty legislation applying to income tax such as Schedules 55 and 56 FA 2009.

86. Reliance on a third party in the context of s 118 TMA was considered by this tribunal in *Nigel Barrett v HMRC* [2015] UKFTT 329 (TC) by Judge Roger Berner. This case is, obviously, not about the SEI returns, but about those for persons engaging workers in the construction industry. The penalties are in s 98A TMA are of comparable amounts. The Tribunal said of this issue:

> "157. I turn then to the facts and circumstances of Mr Barrett's case. I am concerned in this respect not with the failure of Mr Barrett to deduct tax and make payments to HMRC, but with his failure to make returns, starting with the annual return for 2006-07 that was due, under regulation 40A of the Income Tax (Subcontractors in the Construction Industry) Regulations 1993, on 19 May 2007, and subsequent monthly returns under the 2005 Regulations.
>
> 158. Mr Barrett has, since around 2000, been a self-employed small jobbing builder. He had some experience of the CIS, or at least its predecessor scheme, from the perspective of a sub-contractor, when working as part of a team on more substantial construction projects. That, argued Miss McCarthy, gave Mr Barrett an awareness of the CIS which, when coupled with his experience as an employer after 2000 and the need to operate an analogous deduction system for PAYE, would have put a reasonable taxpayer in Mr Barrett's position on enquiry as to his obligations as a contractor under the CIS.
>
> 159. Mr Barrett did not make any particular enquiry in this regard, whether in informing his choice of accountant, which was done without any investigation into Mr Aspros' capabilities and experience, but for convenience of access, or in seeking particular advice from Mr Aspros as to his obligations under the CIS. Mr Barrett simply provided Mr Aspros with the relevant paperwork, and signed, without question, everything which Mr Aspros put in front of him. Miss McCarthy submitted that Mr Barrett's failure to make any check as to the position, whether from Mr Aspros or from HMRC, was unreasonable.
>
> 160. I do not agree that Mr Barrett's actions were unreasonable. In my view, the steps taken by Mr Barrett to employ an accountant who evidently held himself out as able to provide a comprehensive service, both as regards accounting and tax, for a small business such as that of

Mr Aspros, and in providing all relevant documentation to Mr Aspros, were the actions of a reasonable taxpayer in the position of Mr Barrett. Whilst Mr Barrett did not undertake any research in to Mr Aspros' capabilities before appointing him, he was reasonably entitled to assume, from Mr Aspros' acceptance of the appointment, that Mr Aspros would be competent to deal with both the accounting and tax aspects of his business. I do not accept that such a reasonable taxpayer would necessarily have taken separate steps to inform himself, independently of his accountant, of his obligations to make returns under the CIS, whether by seeking a second opinion, or by consulting HMRC, or HMRC's published guidance, himself.

161. The test is one of reasonableness. No higher (or lower) standard should be applied. The mere fact that something that could have been done has not been done does not of itself necessarily mean that an individual's conduct in failing to act in a particular way is to be regarded as unreasonable. It is a question of degree having regard to all the circumstances, including the particular circumstances of the individual taxpayer. There can be no universal rule; what might be considered an unreasonable failure on the part of one taxpayer in one set of circumstances might be regarded as not unreasonable in the case of another whose circumstances are different.

162. I take into account the fact that Mr Barrett had some experience of a deduction scheme in the construction industry. However, that experience was as a sub-contractor in the context of larger projects, and would have given Mr Aspros no particular insight into the filing obligations of a contractor. Mr Barrett was himself unaware of those filing obligations when he first employed sub-contractors, but he had provided Mr Aspros with all the necessary paperwork from which Mr Aspros had been able to prepare Mr Barrett's accounts, including reference to expense incurred in relation to sub-contractors; accounts referring to such expenses, both for year end 31 January 2006 and 2007, had been completed well before the filing date for the annual return for 2006-07. *In my view, a reasonable taxpayer in Mr Barrett's position, having employed an accountant to deal with both accounting and tax, including, PAYE, and having provided the accountant with all relevant information with respect to his business, would have been entitled to rely on that accountant to draw attention to any relevant filing obligation. It would also have been reasonable for such a taxpayer to have concluded, from his accountant's silence, that there were no such obligations outstanding.* [My emphasis]

163. The fact that the filing obligation cannot be described as particularly complex, or arcane, does not alter the position for a notional taxpayer in Mr Barrett's position. Mr Barrett was an ordinary small trader who, taking account of his previous experience of the CIS, cannot be imbued with any particular sophistication or knowledge of the CIS so as to put him on reasonable enquiry as to obligations he had incurred merely by employing a few sub-contractors in a small way and on individual occasions. *In short, it was not unreasonable for a taxpayer in Mr Barrett's position not himself to have been aware of the particular filing obligations under the CIS. This is not a case in which a taxpayer,*

> *knowing of an obligation, merely delegates that task to a third party and does not take reasonable steps to ensure that it has been undertaken.* [My emphasis]
>
> 164. In my judgment, in the circumstances of this case, it was not unreasonable for Mr Barrett to have been unaware of the filing obligations in question, and by appointing an accountant in the way that he did Mr Barrett acted as a reasonable taxpayer, aware of his own limitations in tax and accounting matters, would have done. There was nothing unreasonable in the manner in which Mr Barrett conducted his relationship with Mr Aspros, or in the timely provision of relevant information from which Mr Aspros could reasonably have been expected to identify the relevant filing requirements for a business such as that of Mr Barrett. It was not unreasonable for such a taxpayer to have assumed that Mr Aspros was able to, and would, advise on any relevant tax obligation that was apparent from the information provided to him. Nor was it unreasonable for a taxpayer such as Mr Barrett, having received from Mr Aspros no indication that any filing obligation had been incurred in respect of his use of sub-contractors, not to have raised the question himself whether there might be a filing obligation of which he was unaware, either with Mr Aspros, or HMRC, or indeed anyone else."

87. I have quoted so much of this decision because I consider it to be wholly apt to apply what it says to the appellant's circumstances and their reliance on an "expert".

88. I therefore also hold that the appellant had another reasonable excuse for failing to file a nil return for Q2 and Q3.

Fairness & lack of proportionality

89. The case that HMRC referred to without naming it is I assume *HMRC v Hok Ltd* [2012] UKUT 363 (TCC). I must follow *Hok* and say that I have no jurisdiction to consider questions of fairness.

90. As to proportionality that issue was also addressed in relation to the penalties under the CIS scheme by the Upper Tribunal in *Anthony Bosher v HMRC* [2013] UKUT 579 (TCC). That Tribunal determined that given the structure of s 100B TMA the appellant's remedy is a judicial review of any HMRC decision not to mitigate under s 102 TMA. There are two differences between the penalties in this case and those in *Bosher*: in *Bosher* the penalties were fixed and they were not for failure to file nil returns. But I do not think those differences affects the question of the availability of a remedy from this Tribunal.

No loss of tax (nil returns)

91. The appellant says that there is no loss of tax to HMRC. This is a common complaint about penalties under Schedule 55 FA 2009 (failure to file a tax return) where the return when filed show no tax payable. Given the level of penalties leviable under Schedule 55 where the failure continues for 6 months, Schedule 55 can be said to be harsh, but harshness is not enough – the penalty must, to be judged to be disproportionate, be not merely harsh but plainly unfair. Schedule 55 does not, in my

view and that of other judges of this tribunal, reach that level, especially given the ability to mitigate where there are special circumstances. It might be said that being penalised by having to make a nil return of information is even harsher than being penalised for making a return of detailed information which shows no tax to be due, but two matters are still relevant. One, s 102 TMA allows for mitigation and two, this tribunal has no jurisdiction where the appeal is under s 100B TMA.

Observations

92. I have not needed to consider the legislation in any depth given my decision as to whether there was a reasonable excuse.

93. There are certain aspects of it which are puzzling (at least to me).

94. Firstly, the Explanatory Notes for the amendments made to s 98 TMA by s 18 FA 2015 quoted from at §40 went on to say:

> "This clause supports the Government's anti-avoidance policy by tackling those who have carelessly or deliberately failed to comply with the returns requirements in regulations made under s716B of ITEPA 2003. These regulations will allow HMRC to take an appropriate *targeted* compliance response where required." [My emphasis]

95. Yet from *A** at [24] it can be seen from HMRC's response to directions that:

> "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."

96. Thus the penalties are not targeted at all. This is reminiscent of the position in relation to penalties under paragraph 4 Schedule 55 FA 2009 where shortly before the coming into force, HMRC made a similar high level decision to impose the penalties on all who continued to fail to file three months after the deadline, a drastic difference from the previous procedure in s 93(3) TMA.

97. There is nothing this tribunal can do about HMRC's actions in doing what they have done in this case but to lament it. However by failing to use the legislation in a targeted way HMRC have shot themselves in the foot if I and the Tribunal in *A** are right. By relying on the computer to make the assessments they have invalidated the automatic assessments.

98. HMRC have referred to a familiarisation period during which they did not impose penalties. Thus SEIs who existed at 6 April 2015 were given a "soft landing". But the appellant did not become an SEI until 2017 so even though it became, in HMRC's view, liable to penalties in its first year, it could not benefit from the familiarisation period. This seems illogical and unfortunate, but not something that this Tribunal can do anything about, in the absence of a "special circumstances" provision.

99. In relation to the obligation to make nil returns I said at §51 that I had doubts as to whether there is actually an obligation to make a return. The reason for these doubts stems from the definition of SEI in regulation 84E. The effect of regulation 84E(b) is that where there is no or only one person supplied to a client, the agency is not an SEI for the quarter. It is not required to make a return for that reason.

100. The requirement to make a nil return if this is the position in an agency's first quarter of operation (including where there is one person only falling within the requirements) does not apply, because regulation 84F(5) only applies if there has been a return made for a previous quarter. The use of "made" there is odd. It suggests that if an agency which does fall within the meaning of SEI in regulation 84E fails to make a return, it cannot be obliged to make a nil return thereafter until it has made the return.

101. My doubt arose because in the circumstances of the appellant in Q2 and Q3 it was not an SEI, but was still required to make a return, something of a contradiction. But regulation 84E(5) says that the SEI shall continue to make a return but at a time when it is not an SEI. The way this must be construed I think is that the obligation to make a nil return is imposed on an SEI in the quarter when it made a return and is a continuing obligation whether or not it remains an SEI. Thus if a person is an SEI for Q1 the nil return obligation is activated. If it also an SEI for Q2 that obligation to make a nil return continues in existence but is not triggered until there is a period in which the agency is not an SEI.

102. At that point an agency has a choice given it by regulation 84F(5). It can tell HMRC that it is not an SEI in which case the obligation ceases, or it can file a nil return. If it files a nil return it must continue to do so despite it being an SEI but it need not file any returns after the fourth consecutive quarter in which it is not an SEI and it can always escape the obligation by notifying HMRC that it is not an SEI.

103. The appellant notified HMRC that they were not an SEI by letter on 5 March 2018. Why does this not nullify the requirement to make nil returns for Q2 and Q3? The regulation says the obligation continues until the agency notifies HMRC that it is "no longer" an SEI. This I assume was intended to establish that the obligation ceases to be operative from the date of the notification, ie in this case no Q4 obligation was required (certainly no failure to make a nil return has been penalised).

104. But in fact the appellant did not tell HMRC it was "no longer" an SEI, it said it had not been one in Q2 and Q3. And in any case it is arguable that notification of non-SEI status should nullify any previous penalties. HMRC say that the obligation to file a nil return is an important one because failure to comply creates unnecessary burdens for HMRC and the agencies. I can see that notifying late, ie after the deadline for the first penalty for a nil return, does cause a little work for HMRC. But I am not sure that the burdens so imposed justify £750 worth of penalties.

105. It is also slightly odd that if an agency goes from two individuals supplied on non-PAYE terms to none, two returns are required, but if has one individual for two periods no returns are required. It seems the "one person" rule is to keep Personal Service Companies out of the legislation.

106. It is also an ironic fact that this legislation started on 6 April 2015. The month ending on 5 April 2015 was the last month for which a person engaging sub-contactors in the construction industry had to make a nil return (to ease the compliance burden on them) – see SI 2015/429 and the Explanatory Memorandum.

5 107. Returns under regulation 84F must be made by electric communication (paragraph (3)) and that must be an "approved method". "Approved method of electronic communication" is defined for the purposes of the PAYE regulations in regulation 189 as

> "a method of electronic communications which has been approved, by
> 10 specific or general directions issued by the Commissioners for Her Majesty's Revenue and Customs, for the delivery of information of that kind or the making of a payment of that kind under that provision"

108. HMRC website contains a comprehensive list of, and links to, directions so made by the Commissioners at https//www.gov.uk/government/collections/electronic-
15 business-commissioners-directions—2. It does not contain any directions in relation to returns under regulation 84F. In the absence of directions then the evidential provisions of Chapter 2 Part 10 PAYE Regulations do not apply, so the presumptions of delivery etc do not apply. In fact where an "unauthorised" method is used, regulation 198 provides that it is conclusively presumed that the information has *not* been delivered.
20 And as regulation 84F provides for mandatory electronic communication I would have expected to see regulations in Part 10 PAYE Regulations dealing with them, as there are for PAYE generally and for RTI.

109. It does not matter in this case as here no relevant returns were filed whether using an approved or unauthorised method. But it is strange that the obvious step of providing
25 the necessary regulations or direction for the mandatory filing was not taken. 2015 seems to have been a year for such failures, as there is no trace of any regulations or direction dealing with NRCGT returns either.

Decision

110. Under s 100B(2)(b)(i) the penalties under s 98 TMA for the quarters ended 5
30 October 2017 and 5 January 2018 are set aside.

111. 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
35 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

40

RELEASE DATE: 31 October 2018