

DECISION

Introduction

1. These are the consolidated appeals of Mr Christopher Fulbrook acting as agent for AEI Group Limited (referred to in this decision as “AEI Group”) and of AEI Group itself against penalty determinations for failure to deliver company tax returns. The penalties are both flat-rate penalties under paragraph 17 Schedule 18 Finance Act 1998 and tax-related penalties under paragraph 18 Schedule 18 Finance Act 1998. The penalties relate to periods ended 31 March 2007 to 31 March 2013, in the case of Mr Fulbrook acting as agent, and for periods ended 31 January 2007 to 31 January 2013, in the case of AEI Group itself.
2. The issues before the tribunal were:
- (a) whether the notices to file company tax returns for periods ended on or before 4 January 2010 were invalid and the penalty determinations for those periods should be set aside on the grounds that the company, AEI Group, was only incorporated on 4 January 2010 and so did not exist before that date;
 - (b) whether the notices to file company tax returns for periods ended 31 January 2007 to 31 January 2012 issued to AEI Group had been properly served on the company;
 - (c) whether the appellants had a reasonable excuse for failure to file returns; and
 - (d) whether HMRC’s actions have denied the appellants the right to a fair trial and so are in breach of the appellants’ rights under Article 6 of the European Convention on Human Rights.

The applicable law

3. The applicable legislation is set out in Appendix 1 to this decision.

Evidence

4. HMRC produced a bundle of documents for the hearing. The appellants produced a bundle of additional documents. The parties provided certain other documents to the tribunal in the course of the hearing. These were admitted to evidence. Those other documents were: copies of pages from the note book of Mr Jason Every, an officer of HMRC, relating to his meeting with Mr Fulbrook on 22 February 2012; and a letter dated 15 May 2014 from Mrs Samantha Baker of Gilbert Tax, the appellants’ tax agents, to HMRC.
5. The only witness statement was that of Mr Jason Every. We also heard oral testimony on oath from Mr Every, who was cross-examined by Mrs Baker and Mr

Craig Tully of Gilbert Tax on behalf of the appellants. The appellants provided no witness statements and no oral testimony was given on their behalf.

6. On the basis of the documents and of the oral testimony of Mr Every, we find the facts as set out below.

5 **Facts**

The identity of the company

7. A company, known as Associated Engineering Industries Limited (and referred to in this decision as “AEI”) was registered for VAT in the UK in February 2000.

10 8. When it was first registered for VAT purposes, AEI was described as a company incorporated in the Bahamas. Its registered office was given in various documents as an address in the Bahamas. Its UK address for VAT purposes was Mr Fulbrook’s home address in Truro.

15 9. In a letter dated 5 July 2010, Mr Fulbrook wrote to HMRC to advise HMRC of a change of the name of the company from “Associated Engineering Industries Limited” to “AEI Group”. Mr Fulbrook expressed this change as a change of name only. The reason given by Mr Fulbrook for the change of name was simply that the original name was proving too long for his customers.

20 10. There was no indication at this stage that AEI Group was anything other than the same company as had been originally registered for VAT purposes, but operating under a new name. It was only in the VAT visit conducted by Mr Every on 22 February 2012, to which we refer below, that Mr Fulbrook first described AEI Group as having been located in Belize.

25 11. The appellants have submitted as part of these proceedings that AEI Group is, in fact, a different company from AEI. In support of this submission, they refer to a Certificate of Incorporation of the company in Belize dated 4 January 2010 and a copy of the memorandum of association of the company. The evidence is not consistent on this issue. The appellants have submitted that AEI “ceased” in 2010 and that after 4 January 2010 the business was conducted by AEI Group. But, we have seen no evidence of the liquidation, winding-up or dissolution of AEI or of a transfer
30 of the business by AEI to AEI Group. Indeed, the business has continued to trade using the same VAT registration number.

35 12. As we mentioned above, we have heard no evidence from Mr Fulbrook to clarify this matter. Mrs Baker and Mr Tully, on behalf of the appellants, stated that Mr Fulbrook is confused by all of these arrangements and would not be able to provide any helpful evidence to the Tribunal. This was regrettable.

13. Equally, HMRC have not offered any alternative explanation for the existence of the Certificate of Incorporation - such as whether it might be a certificate of incorporation of change of name, or whether it might be a certificate issued following

a re-domiciliation of AEI to Belize followed by a change of name - or for the change in registered office of the company.

14. The parties have accepted that, on the basis of the decision in *King v Walden* [2001] STC 822, the burden of proof in these proceedings falls on HMRC. Having taken that into account and on the balance of probabilities, we find that AEI Group is a different company from AEI. That conclusion, if it is correct, inevitably has consequences for other aspects of the tax affairs of AEI, AEI Group and Mr Fulbrook. These appeals relate only to the penalties raised on AEI Group and Mr Fulbrook as agent of AEI Group and we do not comment further on the other consequences of that conclusion.

The operation of the business

15. The business of AEI and subsequently that of AEI Group involved buying and selling machines to be used in the plastics industry. AEI or AEI Group has acted either as an intermediary between the buyer and seller of the machines and obtained a commission or as principal acquiring ownership of a machine and selling the machine to a purchaser. Neither AEI nor AEI Group took physical delivery of machines itself.

16. The VAT records of the business (whether conducted by AEI or AEI Group) have largely been regarded as compliant. Several claims have been made to recover input tax. This was largely because the business made most of its supplies to customers outside the UK.

17. At all material times - whether in a period whilst the business was conducted by AEI or in a period when it was conducted by AEI Group – negotiations of contracts have been undertaken by Mr Fulbrook largely from his home address in Truro.

18. We have heard various representations that Mr Fulbrook refers decisions on contracts to others before they are entered into, but we have seen no material evidence of the involvement of any person other than Mr Fulbrook in the active conduct of the business. On the basis of the evidence presented to us and on the balance of probabilities, at all material times AEI and, from 4 January 2010, AEI Group have conducted business in the UK through the agency of Mr Fulbrook, who had authority to conclude contracts on behalf of the relevant company and did so.

19. In a letter from the company dated 4 February 2000, Mr Fulbrook was appointed as “agent” of the company in the UK. That letter was signed by Mrs C T Tonks, as director of the company. Mr Fulbrook is described in other correspondence with HMRC and in various documents filed with HMRC as a “director or company secretary” of the company or as “managing director” of the company.

20. We have seen no evidence of the ownership of the shares in AEI. There are some indications that the shares in AEI were held on behalf of Mr Fulbrook, although other evidence suggests that the shares were beneficially owned by a Mr Mehmet Gulpinar, a Cyprus resident, on the basis that he acquired the shares as a result of guaranteeing the company’s business in 2005.

21. During the period whilst the business was carried on by AEI Group, we have only seen reference to one director of that company. That is Sarah Petre-Mears, who is described as a “nominee director”. Sarah Petre-Mears is also described as acting as a “nominee shareholder” in the company. It is not clear for whom Sarah Petre-Mears is holding the shares or for whom she is acting as a nominee director, although there is a reference in some of the correspondence to the possibility that Mr Fulbrook may be entitled to acquire the shares in AEI Group from Ms Petre-Mears.
22. For the purpose of these appeals, we do not need to reach a conclusion on the ownership of and composition of the boards of directors of AEI or AEI Group and we do not do so. We have seen no material evidence that any person other than Mr Fulbrook was or is involved in their management and control to any material extent. There is ample evidence to raise reasonable concerns on the part of HMRC that AEI and AEI Group were and are resident in the UK for corporation tax purposes.
23. Subject to the points to which we refer below, neither AEI nor AEI Group has ever filed a return for corporation tax purposes.

The current proceedings

24. The present proceedings originate from a VAT assurance visit conducted by Mr Every on 22 February 2012 at the home of Mr Fulbrook in Truro. At that meeting, Mr Every inspected VAT records of the business for various periods. Some minor irregularities were identified in the VAT records of the business, but in all other respects, the VAT records were found to be in order. Mr Fulbrook complied with all reasonable requests made by Mr Every for information and access to documents.
25. As a result of that visit, Mr Every became concerned that the company was not registered for corporation tax. He referred the matter to a corporation tax specialist within HMRC, Mr Graham Barding.
26. Mr Barding wrote to Mr Fulbrook on 8 March 2012 to inform Mr Fulbrook that he had opened a corporation tax record in the name of AEI Group.
27. Mr Fulbrook appointed Gilbert Tax to act on his behalf. It is not clear precisely when all of the arrangements to enable Gilbert Tax to act as his tax agent were completed, but it would appear that Gilbert Tax were appointed on or around 19 March 2012.
28. HMRC issued notices to file tax returns to AEI Group on 18 March 2012. Those notices related to periods ended 31 January 2007 to 31 January 2012. The notices were sent to the address in the Bahamas that was the registered office of AEI as it was the address on HMRC’s files at that time. They were not sent to the registered office of AEI Group in Belize nor to Mr Fulbrook’s address in Truro.
29. Although the notices were not issued to the registered office of AEI Group or to Mr Fulbrook’s home address, we infer from the fact that Mr Fulbrook was able to respond quickly to the issue of the notices by appointing agents to act for the

company and that the appellants have not submitted that the notices were not received by them, that the notices were passed on to AEI Group and Mr Fulbrook and so were effectively communicated to AEI Group and Mr Fulbrook.

5 30. There followed a chain of correspondence between Mr Barding and Mrs Baker of Gilbert Tax in which Mr Barding sought further information surrounding the tax affairs of the company. As a result of those enquiries, Mr Barding became concerned that the company might not be resident in the UK for tax purposes and may be trading in the UK through a permanent establishment. He opened a corporation tax record for Mr Fulbrook as agent of AEI Group on 30 August 2012.

10 31. HMRC issued notices to file corporation tax returns to Mr Fulbrook as agent of AEI Group on 23 September 2012. Those notices were sent to Mr Fulbrook's home address and to Gilbert Tax as tax agents. The notices related to periods ended 31 March 2007 to 31 March 2012.

15 32. On 9 October 2012, HMRC issued penalty determinations for AEI Group for flat rate penalties under paragraph 17 Schedule 18 Finance Act 1998 for periods ended 31 January 2007 to 31 January 2011.

33. On 17 March 2013, HMRC issued penalty determinations for flat-rate penalties under paragraph 17 Schedule 18 Finance Act 1998 to Mr Fulbrook as agent for AEI Group for the periods ended 31 March 2007 to 31 March 2012.

20 34. On 4 September 2013, HMRC issued penalty determinations for AEI Group for flat rate penalties under paragraph 17 Schedule 18 Finance Act 1998 for the period ended 31 January 2012.

25 35. On 1 October 2013, Mr Barding wrote to Mr Fulbrook explaining that he was making determinations for unpaid tax under paragraph 36 Schedule 18 Finance Act 1998 on Mr Fulbrook as agent for AEI Group and to AEI Group for all periods for which notices to file returns had been given. The correspondence makes it clear that those determinations were made in the alternative. The unpaid tax in the determinations was calculated by reference to management accounts produced to Mr Every as part of his VAT assurance visit and VAT records. On 2 October 2013,
30 HMRC issued the determinations.

36. On 11 October 2013, Mrs Baker wrote to Mr Barding protesting against the issue of determinations for unpaid tax and requesting a review of the decision by the Review and Appeals Unit of HMRC.

35 37. On 17 October 2013, HMRC issued penalty determinations for tax geared penalties under paragraph 18 Schedule 18 Finance Act 1998 for relevant periods to both Mr Fulbrook as agent of AEI Group and AEI Group.

40 38. Mr Barding acknowledged Mrs Baker's letter of 11 October in a letter dated 21 October 2013 and stated that he was treating Mrs Baker's letter as an appeal against the penalties charged on Mr Fulbrook as agent for AEI Group and on AEI Group itself.

39. The review by the Review and Appeals Unit confirmed the decision to charge penalties on both Mr Fulbrook as agent for AEI Group and on AEI Group in a letter dated 20 November 2013.

5 40. On 18 December 2013, the appellants gave notice of appeal to the tribunal in respect of the penalty determinations that had been made before that date against Mr Fulbrook as agent for AEI Group for the periods ended 31 March 2007 to 31 March 2012.

10 41. The correspondence continued between HMRC and Gilbert Tax. Gilbert Tax filed tax returns on behalf of Mr Fulbrook as agent of AEI Group on 4 April 2014. The returns were filed on a “without prejudice basis” and “if HMRC are willing to:

(a) confirm that they can accept that the company is not managed and controlled in the UK;

(b) confirm that the notices to file company tax returns for AEI Group have been cancelled; and

15 (c) acknowledge that [Mr Fulbrook] had a reasonable excuse not to file returns as agent for AEI Group or for AEI Group, as Mr Fulbrook could not be expected to be in a position to file when the matter had not been agreed with HMRC, and thus confirm that the late filing penalties will be set aside.”

20 42. The letter included tax returns for the company for periods from 31 March 2007 to 31 March 2012. Those returns showed a lower level of income than might have been expected from the management accounts and VAT records from which the determinations of unpaid tax had been calculated. We understand that those returns were intended to show profits derived from sales to UK customers. They did not
25 show the results of sales to customers outside the UK.

30 43. Mr Barding wrote to Gilbert Tax by fax on 11 April 2014. The letter stated that HMRC was not able to accept tax returns on a without prejudice or conditional basis and that HMRC was not able to confirm or acknowledge any of the matters referred to in the letter from Gilbert Tax which accompanied the returns. In his letter, Mr Barding states:

35 “Given this, I would be grateful if you would please let me know, by 25 April 2014, if you wish the Returns submitted with your letter dated 4 April 2014 to be processed. For the avoidance of doubt, if I do not hear from you on this matter by 25 April 2014, then I shall assume that you do not wish the Returns to be processed and they will be regarded as withdrawn.”

44. Mr Barding wrote to Gilbert Tax again on 28 April 2014 to confirm that, having received no response to the letter of 11 April 2014, HMRC were treating the tax returns as having been withdrawn. In his letter, Mr Barding says:

“...as I have heard nothing from you, I am now assuming that you do not wish the Tax Returns submitted with your letter dated 4 April 2014 to be processed by me. They will accordingly be regarded as withdrawn.”

45. This position appears to have been accepted by the appellants.

5 46. On 14 May 2014, the appellants gave notice of appeal to the tribunal in respect of
all of the penalty determinations that had been made against AEI Group. These
included a second penalty determination under paragraph 18 Schedule 18 Finance Act
1998 for the period ended 31 January 2012 and a penalty determination under
10 paragraph 17 Schedule 18 Finance Act 1998 for the period ended 31 January 2013,
which had been issued on 18 February 2014.

47. On 14 May 2014, the appellants also gave notice of appeal to the tribunal in
respect of the penalty determinations that had been made against Mr Fulbrook as
agent for AEI Group which had been raised since the previous notice of appeal on 18
December 2013. The relevant penalty determinations were those made against Mr
15 Fulbrook as agent for AEI Group under paragraph 18 Schedule 18 Finance Act 1998
for the period ended 31 March 2012 and under paragraph 17 Schedule 18 Finance Act
1998 for the period ended 31 March 2013, which had been issued on 16 April 2014.

48. Appendix 2 to this decision contains a table which summarizes the penalty
determinations that are the subject of the appeals before the tribunal.

20 49. Directions were issued by the tribunal on 11 September 2014. Gilbert Tax
delivered its skeleton argument in accordance with those directions. The skeleton
argument included reference to the Certificate of Incorporation of AEI Group in
Belize, dated 4 January 2010. This was the first time at which the possibility that AEI
Group and AEI might be separate companies was raised. In all the previous
25 correspondence it had been assumed by HMRC that AEI and AEI Group were the
same company acting under different names.

Discussion

50. The appellants have raised various arguments against the charging of penalties on
Mr Fulbrook as agent of AEI Group and against AEI Group itself. We have dealt
30 with them in turn.

Periods prior to the incorporation of AEI Group

51. The first issue before the tribunal was whether or not the penalty determinations
for periods ending before 4 January 2010 should be set aside on the grounds that AEI
Group was only incorporated on that date.

35 52. The appellants submitted that the notices to file returns for any periods ending
before the company was incorporated should be regarded as invalid.

53. In our view, a notice will not be invalid simply because it later becomes apparent that the company was not incorporated for the period in question. The power of an officer of HMRC to require a return is not limited on its terms to returns for periods for which the company was incorporated. Paragraph 3 Schedule 18 Finance Act 1998
5 permits an officer of HMRC by notice to require a company to deliver a return “(a) relevant to the tax liability of the company or (b) otherwise relevant to the application of the Corporation Tax Acts to the company, as may reasonably be required by the notice”.

54. In circumstances such as these, where HMRC does not have sufficient information to determine whether or not a company was incorporated in a particular period, it
10 must be open to HMRC to require a return to be made for such periods in order to ascertain whether or not there is any liability to which the Corporation Tax Acts may apply. It cannot be the case that HMRC is required to verify the company’s existence at relevant company registries perhaps not only in the UK but in other jurisdictions
15 before it issues a notice.

55. In such cases, in our view, a return may be “relevant to the application of the Corporation Tax Acts to the company” and may reasonably be required. A notice will not be invalid if it later becomes apparent that the company was not incorporated for the period in question.

20 56. That conclusion, however, raises the question as to how a company in receipt of a notice for a period before it was incorporated is expected to respond to that notice.

57. Paragraph 5 Schedule 18 Finance Act 1998 states that a notice under paragraph 3 which requires a company to make a return must specify the period to which the notice relates. This does not mean that HMRC must accurately specify the particular
25 accounting periods of the company to which the notice relates. HMRC may not, of course, have sufficient information to identify accurately the actual accounting periods of the company concerned. Instead, sub-paragraphs (2) and (3) and (4) of paragraph 5 set out the accounting periods of the company to which a notice given under paragraph 3 is to apply. Sub-paragraph (2) sets out circumstances in which the
30 notice requires a return for accounting periods which ended in the period specified in the notice. Sub-paragraph (3) sets out circumstances in which the notice requires a return for accounting periods which began in that period. Sub-paragraph (4) requires the notice to be treated as requiring a return for the whole of the specified period in cases where a company is outside the charge to corporation tax for the whole of that
35 period. Where none of the other provisions of paragraph 5 applies, sub-paragraph (5) provides that no company tax return is required in response to the notice.

58. A company which is not incorporated at any time in the period specified in the notice will not have an accounting period which either begins or ends in the specified period. So sub-paragraphs (2) and (3) of paragraph 5 cannot apply. We are also of
40 the view that sub-paragraph (4) is not capable of applying in such circumstances: sub-paragraph (4) is referring to companies which, whilst incorporated and in existence, remain outside the charge to corporation tax. It is not apt to apply to companies which are not incorporated in the period specified in the notice.

59. For these reasons, in this case, we are of the view, that sub-paragraph (5) of paragraph 5 applies to those notices where AEI Group was not incorporated at any time in the specified period. This means that Mr Fulbrook was not required to file a company tax return in response to the notices served on Mr Fulbrook as agent for AEI Group for periods ended 31 March 2007 to 31 March 2009 and that AEI Group was not required to file a company tax return in response to the notices served on the company for the periods ended 31 January 2007 to 31 January 2009. It follows that the penalty determinations made for those periods should be set aside.

60. This is not a conclusion that we come to lightly given that determinations under paragraph 36 have been made for those periods against which, the parties accept, no appeal lies to this tribunal. We are also mindful of our finding that the evidence is sufficient to raise reasonable concerns that corporation tax should have been paid in respect of earlier periods. However, we assume that HMRC will make full use of its powers to recover any tax that is properly due from the appropriate taxpayers for those periods.

Notice was not validly served by delivery to the address of AEI in the Bahamas

61. The second issue relates only to those notices that were issued to AEI Group itself on 18 March 2012 for periods ended 31 January 2007 to 31 January 2012. Although HMRC were aware, as a result of Mr Every's meeting with Mr Fulbrook on 22 February 2012, that the company may be located in Belize, these notices were issued to an address in the Bahamas, which was the registered office of AEI. That address was the address shown on the VAT records of the business at the time of the issue of those notices. The notices were not sent to the company's tax agent, Gilbert Tax. The issue before the tribunal was whether those notices were validly served on AEI Group.

62. Section 115(2)(a) of the Taxes Management Act 1970 provides that a notice is validly served if it is delivered to a person "at his usual or last known place of residence, or his place of business". Section 115(2)(b) and section 115(3) of that Act allow the Board of HMRC to prescribe a place at which a notice can be validly served. No regulations have been made under those provisions.

63. Although section 115 is capable of applying to a company so that a notice delivered to its place of business is validly served (see *Partito Media Services Limited v Revenue & Customs Commissioners* [2012] UKFTT 256 at [33]), that section is not of material assistance in this case as the notice was not delivered to a place of business of AEI Group.

64. That having been said, section 115 of the Taxes Management Act 1970 is not prescriptive. HMRC can validly serve a notice by some other means, such as handing the notice to a director in person, or by giving it to the company's agent, provided that HMRC has effectively communicated the content of the notice to the recipient (see *Partito Media Services* at [38]).

65. In this case, we take the view that the notices were validly served. They were delivered to the registered office of the company that had previously carried on the business. Other than Mr Fulbrook's home address, this was the only address available to HMRC at the time. As we have mentioned above, we infer from the fact that Mr Fulbrook and Gilbert Tax were able to act upon them almost immediately following the issue of the notices, that the contents of the notices were effectively communicated to them.

Reasonable excuse

66. Under section 118(2) of the Taxes Management Act 1970, "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".

67. The appellants put forward two grounds as to why they might be regarded as having a reasonable excuse for failing to file returns.

Reasonable excuse: HMRC complicit in failure to file returns

68. The first of these grounds was that HMRC has been complicit in the failure of the appellants to file those returns.

69. The appellants have submitted that HMRC agreed that returns could not be filed until the question as to the identity of the correct taxpayer was resolved. We have seen no evidence that HMRC agreed that tax returns could not be filed until the tax position was agreed.

70. The appellants also submit that, notwithstanding the information provided by them, HMRC has failed to decide whether AEI Group should be treated as resident in the UK for corporation tax purposes or whether AEI Group should be treated as not resident in the UK, but carrying on a trade in the UK through a permanent establishment and this has put them in a position where they cannot be expected to file. Instead, HMRC has continued to require returns to be filed by both AEI Group and Mr Fulbrook as agent for AEI Group and has issued determinations under paragraph 36 Schedule 18 Finance Act 1998 on both bases.

71. In our view, the failure of HMRC to agree the tax position in advance cannot amount to a reasonable excuse for failing to file returns. Under the self-assessment system, it is for the taxpayer to file a return to the best of his or her knowledge and belief and for HMRC to then enquire into it. In a case such as this, where the identity of the correct taxpayer is not immediately clear, we do not think that it is unreasonable for HMRC to require several potential taxpayers to make returns in respect of the profits of a business. The submission of those returns is the starting point for resolving which person, if any, is subject to a tax liability in relation to those profits.

72. Furthermore, in cases where the position is uncertain, it is entirely appropriate for HMRC to proceed on alternative bases. The case law establishes quite clearly that

HMRC is entitled to issue alternative assessments in order to prevent loss of tax properly payable (see *Bye v Coren* [1986] STC 393, and *Lord Advocate v McKenna* [1989] STC 485, 61 TC 688). We see no reason why HMRC should not be entitled to conduct enquiries and require returns from several potential taxpayers in relation to the profits of the same business.

Reasonable excuse: appellants unable to sign the return without making a false statement

73. The second reason that the appellants give as to why they might be regarded as having a reasonable excuse for failing to file returns is that they would be unable to sign a return without running the risk of making a false statement. In short, the appellants say that they cannot file returns on alternative bases as required by HMRC without at least one of the sets of returns being incorrect.

74. We do not agree. The declaration that the person signing the company tax return is required to give is that the return is correct and complete “to the best of [his]/[her] knowledge and belief”. That statement does not require the signatory to certify that the return is absolutely correct. It simply requires that person to complete the return with the best information that is available. If the position is uncertain, the person who completes the return can identify that uncertainty to HMRC and will not be regarded as making a false statement by doing so (see Goulding J in *Dunk v General Commissioners for Havant and others* [1976] STC 460n).

75. In the present case, it is open to the company and Mr Fulbrook, who should be in possession of the relevant facts, to make the returns having decided, perhaps with the assistance of advice which of the two alternative bases is, in their view, most appropriate. As we have mentioned above, that should be the starting point for enquiries by HMRC which we would hope would result in an agreed position.

Breach of article 6 of the European Convention on Human Rights

76. Mrs Baker and Mr Tully on behalf of the appellants have submitted that the actions of HMRC by issuing determinations and by requiring AEI Group and Mr Fulbrook to sign returns which might involve making a false statement have deprived the appellants of the right to a fair trial under article 6 of the European Convention on Human Rights.

77. For the reasons already given, we do not agree that AEI Group and Mr Fulbrook will be required to make a false statement in order to submit the returns required by HMRC.

78. Nor do we agree that the process that HMRC has adopted has denied the appellants the right to a fair trial. The question of the validity of the determinations for unpaid tax is not an issue before the tribunal. We note however that the question as to whether the issue of a determination might breach a taxpayer’s rights to a fair trial was discussed by the First-tier Tribunal in *Michael Bartram v Commissioners for HM Revenue and Customs* [2011] UKFTT 471 at [28] to [33] (and confirmed by the

Upper Tribunal [2012] UKUT 184). We agree with the reasons given by the tribunal in that case.

Effect on the amounts of penalties determined

5 79. Our conclusions on the first issue in relation to notices given for periods before the incorporation of AEI Group may have consequences for the amounts of penalties due in relation to other periods.

80. The penalties raised under paragraph 17 Schedule 18 Finance Act 1998 are flat-rate penalties, the amounts of which are specified in the legislation. The penalty is £100, if the return is delivered within three months after the filing date and £200, in
10 any other case. These amounts are increased to £500 and £1,000 respectively for a third successive failure.

81. It follows from our conclusions on this issue that neither Mr Fulbrook as agent for AEI Group nor AEI Group was required to file a return for periods before AEI Group was incorporated. This means that the first failure to file a return occurred, in the case
15 of Mr Fulbrook as agent of AEI Group, for the period ended 31 March 2010 and, in the case of AEI Group, for the period ended 31 January 2010.

82. The flat-rate penalties imposed on Mr Fulbrook as agent for AEI Group for failure to file returns for the period ended 31 March 2010 and the period ended 31 March 2011, should therefore be reduced to £200.

20 83. The flat-rate penalties imposed on AEI Group for failure to file returns for the period ended 31 January 2010 and the period ended 31 January 2011, should also be reduced to £200.

84. The penalties raised under paragraph 18 Schedule 18 Finance Act 1998 are tax-related penalties. The penalties are charged by reference to the amount of “unpaid tax”. The “unpaid tax” is defined in paragraph 18(3) as “the amount of tax payable by
25 the company for the accounting period for which the return was required which remains unpaid on the date when the liability to the penalty arises under sub-paragraph (1).” The date on which the liability to a penalty arises under sub-paragraph (1) is the date 18 months after the end of the relevant accounting period or,
30 if later, the filing date as defined in paragraph 14.

85. In the present case, no returns have been filed. HMRC has had to issue determinations under paragraph 36 Schedule 18 Finance Act 1998 containing estimates of the tax due. Those estimates have been made by reference to the information available to HMRC at the time.

35 86. Under paragraph 39 Schedule 18 Finance Act 1998, a determination under paragraph 36 is to have effect as if it were a self-assessment by the company “for enforcement purposes”. By virtue of sub-paragraph (2)(b), those purposes include, the purposes of the provisions of Schedule 18 imposing tax-related penalties.

87. If the tax which is due and payable as a result of the determinations had been included in a self-assessment and had not been paid, it would have been “unpaid tax” for the purposes of paragraph 18(3) on the date on which the liability to the penalty arose.

5 88. On that basis, in our view, the amount of “unpaid tax” for the periods covered by the penalty determinations other than those which relate to periods before the company was incorporated should be the amounts specified in the determinations which have been made under paragraph 36 for those periods.

10 89. This approach has the benefit that the amounts of the penalties charged remain consistent with the determinations made under paragraph 36, from which, as the parties have accepted, no appeal lies to this tribunal (following the decision of the Upper Tribunal in *Michael Bartram v Commissioners for HM Revenue and Customs* [2012] UKUT 184).

Decision

15 90. For the reasons that we have given above:

(a) we set aside the penalty determinations raised on Mr Fulbrook as agent for AEI Group for periods ended 31 March 2007 to 31 March 2009;

(b) we set aside the penalty determinations raised on AEI Group for periods ended 31 January 2007 to 31 January 2009;

20 (c) we reduce the determinations for flat rate penalties under paragraph 17 Schedule 18 Finance Act 1998 on Mr Fulbrook as agent for AEI Group for the period ended 31 March 2010 and the period ended 31 March 2011 to £200 in each case;

25 (d) we reduce the determinations for flat rate penalties under paragraph 17 Schedule 18 Finance Act 1998 on AEI Group for the period ended 31 January 2010 and the period ended 31 January 2011 to £200 in each case;

(e) we confirm the determinations for flat rate penalties under paragraph 17 Schedule 18 Finance Act 1998 on Mr Fulbrook as agent for AEI Group for the periods ended 31 March 2012 and 31 March 2013;

30 (f) we confirm the determinations for flat rate penalties under paragraph 17 Schedule 18 Finance Act 1998 on AEI Group for the periods ended 31 January 2012 and 31 January 2013;

35 (g) we confirm the determinations for tax-related penalties under paragraph 18 Schedule 18 Finance Act 1998 raised on Mr Fulbrook as agent for AEI Group for periods ended 31 March 2010, 31 March 2011 and 31 March 2012;

(h) we confirm the determinations for tax-related penalties under paragraph 18 Schedule 18 Finance Act 1998 raised on AEI Group for periods ended 31 January 2010, 31 January 2011 and 31 January 2012.

91. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

APPENDIX 1

Finance Act 1998

1. Paragraph 3 of Schedule 18 to the Finance Act 1998 provides, so far as relevant, as follows:

5 **Company tax return**

3 (1) An officer of Revenue and Customs may by notice require a company to deliver a return (a "company tax return") of such information, accounts, statements and reports--

(a) relevant to the tax liability of the company, or

10 (b) otherwise relevant to the application of the Corporation Tax Acts to the company,

as may reasonably be required by the notice.

(2)

15 (3) A company tax return must include a declaration by the person making the return that the return is to the best of his knowledge correct and complete.

(4) The return must be delivered to the officer of the Board by whom the notice was issued not later than the filing date.

(5) ...

2. Paragraph 5 of Schedule 18 to the Finance Act 1998 provides as follows:

20 **Period for which return required**

5 (1) A notice requiring a company tax return must specify the period to which the notice relates.

(2) If an accounting period of the company ended during (or at the end of) the specified period, a return is required for that accounting period.

25 If there is more than one, a separate company tax return is required for each of them.

(3) If sub-paragraph (2) does not apply but an accounting period of the company began during the specified period, a company tax return is required for the part of the specified period before the accounting period began.

(4) If the company was outside the charge to corporation tax for the whole of the specified period, a company tax return is required for the whole of the specified period.

5 (5) If none of the above provisions applies, no company tax return is required in response to the notice.

3. Paragraph 14 of Schedule 18 to the Finance Act 1998 provides as follows:

Filing date

14 (1) The filing date for a company tax return is the last day of whichever of the following periods is the last to end--

10 (a) twelve months from the end of the period for which the return is made;

(b) if the company's relevant period of account is not longer than 18 months, twelve months from the end of that period;

15 (c) if the company's relevant period of account is longer than 18 months, 30 months from the beginning of that period;

(d) three months from the date on which the notice requiring the return was served.

20 (2) In sub-paragraph (1) "relevant period of account" means, in relation to a return for an accounting period, the period of account of the company in which the last day of that accounting period falls.

4. Paragraph 17 of Schedule 18 to the Finance Act 1998 provides as follows:

Failure to deliver return: flat-rate penalty

25 17 (1) A company which is required to deliver a company tax return and fails to do so by the filing date is liable to a flat-rate penalty under this paragraph.

It may also be liable to a tax-related penalty under paragraph 18.

(2) The penalty is-

(a) £100, if the return is delivered within three months after the filing date, and

30 (b) £200, in any other case.

(3) The amounts are increased to £500 and £1000 for a third successive failure, that is, where--

- (a) the company is within the charge to corporation tax for three consecutive accounting periods (and at no time between the beginning of the first of those periods and the end of the last is it outside the charge to corporation tax),
- 5 (b) a company tax return is required for each of those accounting periods,
- (c) the company was liable to a penalty under this paragraph in respect of each of the first two of those periods, and
- 10 (d) the company is again liable to a penalty under this paragraph in respect of the third period.
- (4) ...

5. Paragraph 18 of Schedule 18 to the Finance Act 1998 provides, so far as relevant, as follows:

Failure to deliver return: tax-related penalty

- 15 18 (1) A company which is required to deliver a company tax return for an accounting period and fails to do so-
- (a) within 18 months after the end of that period, or
- (b) if the filing date is later than that, by the filing date,
- is liable to a tax-related penalty under this paragraph.
- 20 This is in addition to any flat-rate penalty under paragraph 17.
- (2) The penalty is-
- (a) 10% of the unpaid tax, if the return is delivered within two years after the end of the period for which the return is required, and
- (b) 20% of the unpaid tax, in any other case.
- 25 (3) The "unpaid tax" means the amount of tax payable by the company for the accounting period for which the return was required which remains unpaid on the date when the liability to the penalty arises under sub-paragraph (1).
- (4) ...

6. Paragraph 36 of Schedule 18 to the Finance Act 1998 provides, so far as relevant, as follows:

30

Determination of tax payable if no return delivered in response to notice

36 (1) If no return is delivered in response to a notice requiring a company tax return, an officer of Revenue and Customs may determine to the best of their information and belief the amount of tax payable by the company.

....

5 7. Paragraph 39 of Schedule 18 to the Finance Act 1998 provides, so far as relevant, as follows:

Determination to have effect as self-assessment

39 (1) A determination under paragraph 36 or 37 has effect for enforcement purposes as if it were a self-assessment by the company.

10 (2) In sub-paragraph (1) "for enforcement purposes" means for the purposes of-

(a) the following Parts of the Taxes Management Act 1970-

Part VA (payment),

Part VI (collection and recovery),

15 Part IX (interest on overdue tax), and

Part XI (miscellaneous and supplementary provisions);

(b) the provisions of this Schedule imposing tax-related penalties;
and

(c) ...

20 (3) For those purposes the period for which the determination is made shall be treated as an accounting period of the company, even though-

(a) in the case of a determination under paragraph 36, an officer of Revenue and Customs has insufficient information to determine the accounting periods of the company and exercise their power under sub-paragraph (3)(c) of that paragraph, or

25

(b) ...

Taxes Managment Act 1970

8. Section 115 of the Taxes Management Act 1970 provides as follows:

Delivery and service of documents

115 (1) A notice or form which is to be served under the Taxes Acts on a person may be either delivered to him or left at his usual or last known place of residence.

5 (2) Any notice or other document to be given, sent, served or delivered under the Taxes Acts may be served by post, and, if to be given, sent, served or delivered to or on any person by HMRC may be so served addressed to that person-

(a) at his usual or last known place of residence, or his place of business or employment, or

10 (b) in the case of a company, at any other prescribed place and, in the case of a liquidator of a company, at his address for the purposes of the liquidation or any other prescribed place.

15 (3) In subsection (2) above, "prescribed" means prescribed by regulations made by the Board, and the power of making regulations for the purposes of that subsection shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of the House of Commons.

9. Section 118 of the Taxes Management Act 1970 provides, so far as relevant, as follows:

Interpretation

20 118 (1)

(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

25

APPENDIX 2

Penalty determinations on Mr Fulbrook as agent for AEI Group

Period end	Date of determination	Date of appeal notified	Amount
<i>Flat-rate penalties under paragraph 17 Schedule 18 Finance Act 1998</i>			
31 March 2007	17 April 2013	18 December 2013	£200
31 March 2008	17 April 2013	18 December 2013	£200
31 March 2009	17 April 2013	18 December 2013	£1,000
31 March 2010	17 April 2013	18 December 2013	£1,000
31 March 2011	17 April 2013	18 December 2013	£1,000
31 March 2012	17 April 2013	18 December 2013	£1,000
31 March 2013	16 April 2014	14 May 2014	£500
<i>Tax-related penalties under paragraph 18 Schedule 18 Finance Act 1998</i>			
31 March 2007	17 October 2013	18 December 2013	£4,104
31 March 2008	17 October 2013	18 December 2013	£1,720
31 March 2009	17 October 2013	18 December 2013	£6,174
31 March 2010	17 October 2013	18 December 2013	£1,806
31 March 2011	17 October 2013	18 December 2013	£7,560
31 March 2012	17 October 2013	18 December 2013	£5,400
31 March 2012	16 April 2014	14 May 2014	£5,400

5 **Penalty determinations on AEI Group Limited**

Period end	Date of determination	Date of appeal notified	Amount
<i>Flat-rate penalties under paragraph 17 Schedule 18 Finance Act 1998</i>			
31 January 2007	9 October 2012	14 May 2014	£200
31 January 2008	9 October 2012	14 May 2014	£200
31 January 2009	9 October 2012	14 May 2014	£1,000
31 January 2010	9 October 2012	14 May 2014	£1,000
31 January 2011	9 October 2012	14 May 2014	£1,000
31 January 2012	4 September 2013	14 May 2014	£1,000
31 January 2013	18 February 2014	14 May 2014	£500
<i>Tax-related penalties under paragraph 18 Schedule 18 Finance Act 1998</i>			
31 January 2007	17 October 2013	14 May 2014	£4,104
31 January 2008	17 October 2013	14 May 2014	£1,706.08
31 January 2009	17 October 2013	14 May 2014	£6,125.80
31 January 2010	17 October 2013	14 May 2014	£1,806.00
31 January 2011	17 October 2013	14 May 2014	£7,560
31 January 2012	17 October 2013	14 May 2014	£5,443.64
31 January 2012	18 February 2014	14 May 2014	£5,443.64

**ASHLEY GREENBANK
TRIBUNAL JUDGE**

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RELEASE DATE: 18 June 2015