[2015] UKFTT 0329 (TC)

TC04514

Appeal number: TC/2013/01436

INCOME TAX – construction industry scheme (CIS) – contractor failing to deduct tax on payments to sub-contractor – Income Tax (Construction Industry Scheme) Regulations 2005, regs 9 and 13 – TMA 1970, s 50(6) – penalties for failure to make CIS returns – TMA, s 98A, s 100, s 102 – extent of tribunal's jurisdiction – whether taxpayer had reasonable excuse in respect of failure to make returns – s 118(2) – reliance on accountant

FIRST-TIER TRIBUNAL
TAX CHAMBER

NIGEL BARRETT **Appellant**

- and -

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

TRIBUNAL: JUDGE ROGER BERNER

Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 1 – 3 June 2015

Keith Gordon and Ximena Montes Manzano, instructed by Mazars LLP, for the Appellant

Hui Ling McCarthy, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This appeal concerns tax years 2006-07 to 2010-11. In those years the Appellant, Mr Barrett, carried on business as a jobbing builder under the name NB Building Services. From time to time he engaged sub-contractors and made payments to them.

2. It is accepted that during the material period Mr Barrett was subject to the Construction Industry Scheme ("CIS"). As such, Mr Barrett should have:

(a) registered under the CIS;

(b) made deductions at source from payments he made to sub-contractors (at a fixed rate of 18% for 2006-07 or at the rate of 20% or 30% as circumstances dictated from 2007-08 onwards, unless the sub-contractors were registered to receive payments gross and/or to the extent that the payments related to materials rather than to labour);

(c) made monthly CIS returns to HMRC of such payments (including nil returns), or, in relation to 2006-07, made an annual return; and

(d) made payments to HMRC of the amounts for which, in the relevant period, Mr Barrett was liable to deduct.

3. Mr Barrett failed to do those things. Accordingly, HMRC issued a number of determinations ("regulation 13 determinations") under regulation 13(3) of the Income Tax (Construction Industry Scheme) Regulations (SI 2005/2045) ("the 2005 Regulations") of the amounts which Mr Barrett was determined to be liable to pay HMRC under the CIS. Those initially related to payments made to three sub-contractors and totalled £2,112.30; so far as it relates to the regulation 13 determinations, this appeal concerns such determinations in respect of payments made to one sub-contractor, Mr G Luke, the total tax determined to be due being £1,894.55.

4. HMRC also issued fixed penalty determinations for late returns under s 98A(2)(a) of the Taxes Management Act 1970 ("TMA") for each of the relevant tax years. Those penalties total £40,332. Of that a fixed penalty of £732 applies in respect of the late annual return for 2006-07. The balance comprises penalties for late monthly returns for 2007-08 onwards in respect of which HMRC has offered to mitigate those penalties under s 102 TMA down to £3,196. That offer remains open and, to the extent relevant, will continue to remain open after the determination of this appeal.

Grounds of appeal

5. There are before me now five grounds of appeal, one of which relates to the regulation 13 determinations and the other four to the penalties:

Regulation 13 determinations

(1) Ground A. Mr Barrett submits that the amounts determined in relation to the payments made to Mr Luke are excessive. It is argued that the sum determined to be due from Mr Barrett was paid to Mr Luke, and that Mr Luke has made a return of that amount and has paid tax and national insurance contributions (NICs) in respect of it. It is submitted that the 2005 Regulations can be construed in such a way that this "double recovery" can be avoided, and that the determination should be reduced to nil.

Penalties

(2) Ground B. That HMRC failed to exercise their discretion under s 100(1) TMA when determining the penalties.

(3) Ground C. That Mr Barrett had a reasonable excuse for any alleged compliance failures, such that no penalties are due.

(4) Ground D. That the penalties are disproportionate. In relation to Ground D, Mr Barrett accepts that, because it is bound by the decision of the Upper Tribunal in *Revenue and Customs Commissioners v Bosher* [2014] STC 617, this tribunal does not have jurisdiction to find that the penalties are disproportionate. He wishes, however, to argue to the contrary if this matter proceeds further.

(5) Ground E. That the officer making the penalty determination was not duly authorised for the purposes of s 100(1) TMA.

6. As well as there being an issue of this tribunal's jurisdiction in relation to Ground D (proportionality), HMRC has raised jurisdictional points with respect to Ground A (to the extent that it relates to the decision of HMRC under regulation 9(4) of the 2005 Regulations), Ground B (exercise of discretion under s 100(1) TMA) and Ground E (authorisation).

Ground E – preliminary issue

7. At the commencement of the hearing there was an issue between the parties as to the proper scope of Ground E. The essential question was whether the way in which Ground E was expressed in a written response by Mr Barrett, dated 23 December 2013, to an application by HMRC, contained in HMRC's statement of case served on 10 December 2013, to strike out a number of Mr Barrett's grounds of appeal, namely that the officer making the determinations was not duly authorised for the purposes of s 100(1) TMA, was wide enough to encompass an argument on the part of Mr Barrett that the decision in 2011 to make a Board's Order authorising all officers to issue penalties arising under s 98A TMA, and thus extending the authorisation that had hitherto applied only to senior officers (of Grade 6 and above, or the equivalent), was unlawful as having been made without any consideration as to its appropriateness.

8. After consideration, I gave an oral decision which, subject to the jurisdictional question that remains in relation to that ground, limited the ambit of Ground E to the argument that the expansion of the scope of "authorised officer" to include all those employed by HMRC was unlawful on the grounds that its width is irrational and also contrary to the implicit restrictions imposed by s 100(1) TMA. I also refused to admit the further argument as a new ground of appeal.

9. The text of my oral decision, which is part of this full decision, is set out at the Appendix to this decision.

Evidence

10. For Mr Barrett I had witness statements from Mr Barrett himself, who also gave oral evidence, and from Mr Antony Monger of Mazars LLP, whose statement was unchallenged. For HMRC I had witness statements from Mrs Amanda Bull, a senior officer who managed the officer, a Mrs Sheena Howe, who dealt with the CIS compliance checks in relation to Mr Barrett, Mr David Stephens, an HMRC policy adviser, and Mrs Denise Back, an HMRC employer compliance process adviser with responsibility for, amongst other things, the CIS, each of whom also gave oral evidence. One further witness statement for HMRC, that of Mr Kenneth Claydon, the operational and technical manager of the HMRC team that administers the CIS, was not challenged.

11. I also had a helpful bundle of documents.

12. Much of the factual background was uncontroversial. From the evidence before me, I make the following findings of fact.

The facts

The circumstances of Mr Barrett's defaults

13. As I have described in the introduction to this decision, Mr Barrett is by trade a "jobbing builder", undertaking minor building work for private householders. The major part of his work is in the nature of general repairs, maintenance and renovation, including such work as small extensions and loft conversions. He has few business customers, comprising only landlords of let properties; these account for less than 1% of his income.

14. Mr Barrett has been carrying on this trade since about 2000 or 2001. Before that he was employed by another builder, and as such paid tax under PAYE. Prior to that Mr Barrett had had a period of self-employment, laying ducting pipes for television cables, in the course of which tax had been deducted from his income under the "SC60" scheme. That scheme was, until its abolition in 1999, a process for the deduction of tax at source from payments to sub-contractors in the construction industry which involved the contractor providing the sub-contractor with a form, the SC60, evidencing the payment and the tax deduction; the sub-contractor would return those forms to the Inland Revenue (as it was).

15. In his self-employed business, Mr Barrett employs his son, whose earnings are taxed under PAYE. Including his son, the business has only ever had three employees. The payroll, including the operation of PAYE, has been dealt with by Mr Barrett's accountant, Mr George Aspros FAIA of G T Aspros & Co.

16. Mr Barrett began to use Mr Aspros' services when he commenced his self-employed trade. He recognised at that time that, whereas in the past tax had been deducted at source from his earnings, either under the SC60 scheme or PAYE, he would need an accountant to prepare accounts of his income, calculate his taxable profits and complete his tax returns.

17. Mr Barrett was candid in his evidence that he had most likely selected Mr Aspros as his accountant because of the convenience of the location of the offices of G T Aspros & Co. He had not based his choice on any particular recommendation nor because he knew that Mr Aspros had any specialist expertise in acting for contractors in a similar line of work. He had not done any research into Mr Aspros' capabilities, and had not seen the firm's website. He had not checked with Mr Aspros himself whether he had any particular experience with other clients who were contractors.

18. The relationship between Mr Barrett and Mr Aspros was informal. Mr Barrett did not enter into any letter of engagement with G T Aspros & Co. If he had anything to give Mr Aspros, such as in relation to accounts, PAYE or VAT, Mr Barrett would simply pop in to Mr Aspros' office. Mr Aspros prepared Mr Barrett's accounts, operated the payroll and, at a time when Mr Barrett was registered for VAT, prepared Mr Barrett's VAT returns. Those were tasks which Mr Barrett had specifically asked Mr Aspros to undertake and for which a fee was paid. Mr Barrett relied on Mr Aspros in these respects, and trusted him to do what was necessary. He would sign what Mr Aspros provided without going through it in detail.

19. Mr Aspros has not given Mr Barrett tax advice, except on an *ad hoc* basis. Mr Barrett would ask Mr Aspros in relation to correspondence he might receive from HMRC, and would also on occasion seek his advice on something Mr Barrett might have read. Mr Aspros did not charge specifically for this advice. Otherwise, Mr Barrett did not specifically ask Mr Aspros for tax advice. He assumed that Mr Aspros would inform him if there were any problems. Mr Barrett confirmed that he had never asked Mr Aspros for advice in relation to the CIS.

20. At the relevant time, Mr Barrett had heard of the CIS, but he had thought that it applied to what he described as "large site work", by which he meant the kind of construction sites where large or multiple constructions take place, such as housing estates or large shop, office and factory construction. He had never considered that he, or his work, would fall within the CIS. He did not think that his type of work, involving repairs and renovation with the occasional extension or conversion, would be classified as "construction industry".

21. Mr Barrett confirmed that (a) he did not check this assumption on HMRC's website; (b) he did not otherwise check the assumption by asking HMRC; and (c) he did not check his assumption with Mr Aspros.

22. I was shown the accounts for Mr Barrett, trading as NB Building Services, for the years ended 31 January 2006 and 2007. In each of the trading and profit and loss accounts for the year an entry was made for expenses of "Subcontractors", for 2006 in the sum of £400 and for 2007 of £6,602. These accounts were prepared by Mr Aspros and signed by G T Aspros & Co, those for 2005-06 on 16 February 2006, and those for 2006-07 on 27 February 2007. They had been approved by Mr Barrett without detailed consideration. Mr Barrett confirmed that he used sub-contractors only very rarely when he needed the specific skills of, for example, a plumber or an electrician. These occasions were principally dictated by the relevant building regulations, and the need for certain types of work to be undertaken by suitably qualified or registered persons. Those sub-contractors billed Mr Barrett and he invoiced that work to his customer at cost with no mark-up.

23. In his evidence, Mr Barrett recalled his business having been subjected to a VAT inspection. The evidence showed that in July 2007 HMRC had informed Mr Barrett that he was due to have a VAT visit and had asked him to complete a questionnaire and to return it with the annual accounts for the prior two years. The accounts for 2006 and 2007 were sent to HMRC. It appears that it was Mr Aspros who did this, although the reply from HMRC was addressed to Mr Barrett.

24. For the tax years 2006-07 to 2010-11, Mr Barrett made payments to three sub-contractors, a Mr G Luke, Kings Fibre and Electro Main. Payments were made to Mr Luke in each of the tax years other than 2010-11. Mr Barrett did not deduct tax when making those payments, and did not – until subsequently assessed - account to HMRC for the tax that should have been deducted. Nor did he make any of the CIS returns that were required to be made.

25. As regards Mr Luke (the appeal in this respect is confined to determinations in relation to payments to Mr Luke), Mr Barrett gave evidence regarding conversations with him concerning his own tax affairs. In his witness statement Mr Barrett had said that he had been assured by Mr Luke that Mr Luke had settled his liability with HMRC. In support of that statement Mr Barrett produced a copy of a letter from HMRC to Mr Luke dated 5 March 2014. That letter referred to the receipt by HMRC of self assessment tax returns for tax years 2007-08 and 2008-09 but, having noted the time limits for making those self assessments and the date of a determination made in respect of 2008-09, said:

> "Because we received your returns after these dates, the determinations we sent you on the dates shown above will remain in force. For years where we have not made a determination, I do not intend to take any further action with the information on those tax returns.
>
> I have cancelled the fixed penalty we charged you for the 2007-08 tax year."

26. In cross-examination, Mr Barrett recalled a discussion he had had with Mr Luke in around 2012. At that stage Mr Luke had told Mr Barrett that he was having a dispute with HMRC and that he was behind with his taxes.

HMRC's investigation into Mr Barrett's non-compliance with the CIS

27. For tax years 2008-09 and 2009-10, Mr Barrett's tax returns claimed deductions for certain costs, described by HMRC in their letter to Mr Barrett of 23 September 2011 as "CIS Costs". That letter, written by Mrs Sheena Howe, a compliance officer of HMRC, stated that Mrs Howe had reason to believe that Mr Barrett had engaged sub-contractors within the scope of the CIS during those years and that he might have made payments without making the necessary deductions. In the letter Mr Barrett was asked for information regarding the sub-contractors he had engaged, and he was informed of his obligations under CIS and of the fact that he might be liable to a penalty under s 98A(2) TMA for non-submission of returns.

28. Mr Aspros replied to HMRC promptly on 5 October 2011, summarising the payments for years 2008 to 2011, and enclosing all but two of the relevant copy invoices.

29. A further letter from Mrs Howe to G T Aspros & Co dated 24 October 2011, copied to Mr Barrett, gave further details of the CIS, the deductions rates required in respect of the sub-contractors concerned, and the fact that costs of materials could be deducted from the gross amount before applying the tax deduction. The letter also referred in greater detail to the penalties that were applicable to the non-submission of monthly returns.

30. That prompted Mr Barrett to telephone Mrs Howe on 28 October 2011. Following a further explanation of what Mr Barrett's obligations under the CIS had been, Mr Barrett is recorded as having said that he was amazed that his agent (G T Aspros & Co) had not told him any of what he was now being informed. He had assumed that as he was paying his agent they would have done so. He gave all his paperwork to the agent and they did the rest. It was explained to Mr Barrett that as the owner of the business the responsibility was ultimately his. After that discussion, Mrs Howe sent Mr Barrett booklet CIS340 Guide for Contractors and Sub-contractors and invited him to consider this and provide further information to enable agreement to be reached on the amounts that should have been returned had the CIS been operated correctly.

31. Mr Barrett himself then replied to Mrs Howe on 17 November 2011, providing what information he had been able to obtain. He said:

> "I must apologize for any confusion regarding this matter as I had assumed that my accountant Mr G T Aspros would have picked up any inaccuracies and dealt with them accordingly. Had I realised that anything needed my attention I would have sorted the matters out as soon as possible but please excuse my ignorance as I took it that everything was all in order due to Mr G T Aspros not informing me that there were any issues to be addressed."

32. Mr Aspros wrote to Mrs Howe on 21 November 2011 concerning the parts of the invoices related to materials and noting that it was understood that the sub-contractors paid tax and that relief was assumed to be due under regulation 9(4) of the 2005 Regulations. Mrs Howe responded on 12 December 2011 with a schedule of CIS

deductions considered due as a result of the information provided, and seeking agreement in that respect. Mrs Howe also requested an estimate of the material costs, which would not be subject to a deduction, and the UTR numbers of the subcontractors to enable their tax records to be checked.

33. Subsequently, and following a telephone conversation with Mr Barrett, on 8 February 2012 Mrs Howe wrote to Mr Barrett, with a copy to G T Aspros & Co, confirming the receipt of the correct UTR number for Mr Luke, which had enabled HMRC to confirm that Mr Luke was registered under the CIS for a standard rate deduction of 20%, and that the schedule of deductions had been revised accordingly. The letter requested the UTR for Kings Fibre Glass and an estimate of the material costs. It stated that if the information was not provided by 8 March 2012, the claim for relief under regulation 9(4) of the 2005 Regulations would be considered by reference to the amounts on the schedule.

34. On 17 February 2011, Mr Barrett provided information as to material costs. That was accepted by Mrs Howe, and she informed Mr Barrett of that fact by letter of 12 March 2012. A revised schedule was sent to Mr Barrett for his agreement. It was explained that, following such agreement, for which a date was set of 23 March 2012, the regulation 9(4) claim would be considered.

35. That claim was considered by HMRC, and Mr Barrett was sent two letters dated 11 April 2012, from a Mr Alan Kirkup, of the "CIS FL Technical Team". In one, relating to certain payments to ElectroMain Ltd, Mr Barrett was informed that he was not liable to pay the amounts under-deducted. In the other, which covered payments to Mr Luke, Kings Glass Fibre and one payment to ElectroMain, Mr Barrett was told that, having taken into account all the available evidence, Mr Kirkup was not satisfied that the conditions in regulation 9(4) had been met.

36. On 27 April 2012, Mrs Howe wrote to Mr Barrett with a revised computation of the amounts of under-deductions due, taking account of the relief that had been given. The letter also advised Mr Barrett of the fact that penalties would be calculated under s 98A(2) TMA for the failure to submit the relevant CIS monthly returns. Mrs Howe wrote again to Mr Barratt on 18 June 2012 to inform him that the penalty position for non-submission of CIS returns had been considered. He was advised that the penalty in respect of the annual return for the period 2006-07 had been calculated at £732, and that in respect of monthly returns for the periods between 6 April 2007 and 5 August 2010 at £128,100. In the latter case, Mrs Howe advised Mr Barrett that, under the power to mitigate penalties in s 102 TMA, she had been authorised to offer to reduce the penalties to £3,196.52. As regards the CIS under-deductions, the amount of £2,814 had been reduced to take account of relief under regulation 9(4) of £701.20. With interest of £283, the total amount arrived at was £6,324. The letter invited Mr Barrett to make an offer in the prescribed form.

37. That prompted a telephone call on 27 June 2012 from Mr Barrett to Mrs Howe in which both the liability for the under-deductions and the penalty was discussed. In the course of that discussion, Mr Barrett informed Mrs Howe that he did not have the money to pay the amount due. Mrs Howe explained that means to pay was a separate

issue and that Mr Barrett's financial circumstances would be considered. Mrs Howe wrote to Mr Barrett on 28 June 2012 to follow up that telephone conversation. That letter included:

> (a) a further explanation of the process regarding a regulation 9(4) claim, and that the question of relief under that regulation could continue to be considered up to the time a contract settlement was entered into or HMRC took formal action to recover the amounts due;
>
> (b) guidance on the issue of whether a contractor had taken reasonable care to comply with the CIS, and the information required in relation to a claim under regulation 9(3), Condition A;
>
> (c) information required to enable HMRC to consider Mr Barrett's financial means, including sending Mr Barrett a form MS142T – statement of personal assets, liabilities and business interests – for completion and return to HMRC; and
>
> (d) a statement that failure to respond with information or to make an acceptable offer would mean that HMRC would consider whether to take formal action to recover the amounts due, subject to Mr Barrett's right to appeal any decision.

38. On 2 July 2012, Mr Aspros wrote to HMRC in response to Mrs Howe's letter of 18 June 2012. Comparing the penalties for the non-submission of returns to the amount of the under-deduction for which Mr Barrett was regarded as being liable, Mr Aspros complained that the penalty "loading" was 185%. Representations were made regarding Mr Barrett's behaviour, both in regard to the defaults and his subsequent disclosure and cooperation, and to the level of seriousness of the defaults. Finally, it was said that the level of the penalty, when added to the CIS liability and interest, was beyond Mr Barrett's means.

39. Mrs Howe replied to Mr Aspros on 5 July 2012 with a further explanation of the penalty regime, inviting Mr Aspros to put forward any further evidence to support a claim of reasonable excuse and, in relation to Mr Barrett's financial means, reminding Mr Aspros of the information, including the completion of form MS142T, that had previously been requested in that respect.

40. The reply from Mr Aspros of 17 July 2012 raised the issue of proportionality, and complained that the level of information that had been sought with respect to Mr Barrett's means reflected a "clear inability upon [HMRC's] part to understand the nature of [Mr Barrett's] business".

41. Mrs Howe replied on 16 August 2012. No comment was made on the legal arguments put forward by Mr Aspros, save that those matters could be brought in due course before a tribunal. The policy for mitigation of a penalty was explained as being that it would be considered only after the penalty had been determined and all appeal rights had been exhausted or abandoned and/or the failure or error which led to the penalty had been remedied or abandoned. In view of the fact that an agreed

settlement appeared unlikely, Mrs Howe informed Mr Aspros that determinations would be issued with regard to the CIS deductions under regulation 13 of the 2005 Regulations, and arrangements would be made for formal penalty determinations to be made for the non-submission of returns. It was explained that the penalty determinations in relation to monthly returns would be issued under s 98A(2) TMA in the full (unmitigated) sum of £128,100, but that if Mr Barrett agreed to accept the reduced amount of £3,196.52, the determinations (intended to refer only to those for failure to submit monthly returns) would be reduced to that figure. On the question of Mr Barrett's financial means, Mrs Howe explained that the list of documents in her letter of 28 June 2012 was illustrative, and that it would be sufficient for Mr Barrett to complete the form MS142T along with providing details of his current income and expenditure.

42. That was followed by a further letter from Mrs Howe to Mr Barrett on 22 August 2012 in which she told Mr Barrett that she had reviewed the question of possible relief under paragraph 9(4) of the 2005 Regulations. However, the position had not changed, and relief could not be given in relation to the relevant under-deductions. Determinations were therefore to be issued in those respects, and also in respect of the penalties for non-submission of CIS returns. Any possible reduction in the penalties, which were to be determined in their legally chargeable amounts, would be dealt with as part of the appeal process.

43. Although I did not have a copy of the letter, Mr Aspros apparently wrote to HMRC on 5 September 2012 to raise certain concerns about the conduct of HMRC's review into Mr Barrett's operation of the CIS. In a response dated 19 September 2012, Mrs S Harrison, an Inspector of Taxes, offered a further explanation of the CIS penalty regime. That included an explanation that the new penalty regime for the CIS, contained in Schedule 55 of the Finance Act 2009 and having effect from 5 October 2011, had significantly affected the levels of penalty, and that consequently, in relation to penalties in respect of CIS returns due before October 2011, those penalties could be mitigated under s 102 TMA if the level of penalty was agreed and an informal settlement was reached. Mitigation could also be reconsidered once any appeal against the formal determinations had been settled.

44. Formal determinations in respect of the CIS under-deductions and the penalties were issued to Mr Barrett on 2 October 2012. G T Aspros & Co lodged an appeal with HMRC on 15 October 2012. A review was then undertaken and completed on 29 January 2013 when HMRC wrote to Mr Barrett to advise him that the decisions were upheld. It was from that review decision that Mr Barrett appealed to the Tribunal on 21 February 2013.

Hardship

45. On the question of hardship, it will be apparent from the above findings that there was correspondence on that subject between HMRC and both Mr Barrett and Mr Aspros. However, although Mr Aspros had made the point, in his letter of 17 July 2012, that the level of information requested by HMRC reflected a misunderstanding on the part of HMRC as to the nature of Mr Barrett's business, I find that, despite Mrs

Howe making it clear in her letter of 16 August 2012 that it was open to Mr Barrett to provide less extensive evidence of his means, no such evidence was ever provided, and no hardship claim as such can be regarded as having been made.

Internal HMRC processes relevant to the determinations

46. As I have referred to above, the individual within HMRC who was primarily concerned with carrying out the compliance checks in relation to Mr Barrett was Mrs Howe. I did not hear evidence from Mrs Howe, but Mrs Howe was part of a team managed by Mrs Amanda Bull, from whom I did hear. I also had evidence from Mrs Back regarding the operational processes for the making of a manual penalty determination under s 100(1) TMA.

47. Mrs Bull is a Senior Officer who manages a team of caseworkers, providing technical and tactical advice, and authorising penalty assessments. In 2012 there were between 10 and 12 caseworkers in a team. Mrs Bull did not have any case work of her own. Whilst it was Mrs Howe who calculated the penalty, and who engaged in the relevant correspondence with Mr Barrett and Mr Aspros, it was Mrs Howe who had authorised the penalty in Mr Barrett's case. That was in accordance with HMRC internal guidance; COG (Compliance Operational Guidance) 914175 states that the caseworker must not approve their own penalty determination, and EM5201 – Penalties: formal assessments and determinations – states that approval is required from an authorising officer, who can be a line manager or manager with appropriate skills.

48. Mrs Bull was unable to provide a definitive answer to how many cases she would deal with on review or for authorisation in a typical week. The best estimate was between 5 and 6, and sometimes more. In her field of compliance for small and medium enterprises, Mrs Bull deals with a range of cases, involving mainly income tax, corporation tax, VAT, employer compliance (PAYE) and CIS, which reflects the "customer base". In the team it was only Mrs Howe who dealt with the CIS. Of the review and authorisation cases dealt with by Mrs Bull in a typical week one might relate to the CIS, but Mrs Howe would seek assistance from Mrs Bull more regularly than that. Overall, over a two-year period, Mrs Bull authorised between 5 and 10 penalty determinations under s 98A(2) TMA.

49. Mrs Howe's grade was a Band O. In terms of hierarchy, Band O was four grades below Grade 6. Grade 6 was a position of significant responsibility, for example Area Director. It was a typical grade of a former District Inspector. Mrs Bull was a Senior Officer, two grades above that of Mrs Howe and two grades below Grade 6.

50. Mrs Bull was unable to recall Mr Barrett's individual case. I make no findings in relation to Mr Barrett's own case from Mrs Bull's evidence. On the other hand, I can make findings as to Mrs Bull's general approach to CIS penalty cases.

51. Mrs Bull was aware of HMRC's guidance contained in COG914180, and to the fact that, according to that guidance, the guidance at EM5201, from which it was possible to navigate to further guidance up to EM5255. I find that Mrs Bull consulted

that guidance as necessary in each individual case, and that the extent of that consultation, including up to EM5255, depended on the particular circumstances. There is no evidence that Mrs Bull failed to consult relevant parts of the guidance in any given case, including that of Mr Barrett. Mrs Bull regarded the guidance as mandatory. She would always follow the guidance when authorising a penalty, and did not consider that she had any discretion to disregard the guidance. If, for example, the guidance stated that a penalty was fixed, Mrs Bull did not consider that she had a discretion not to authorise such a penalty.

52. Mrs Bull's practice when reviewing a file was to consider the whole file from beginning to end. Such a review would take between 20 minutes to 1½ hours. There were circumstances where a penalty might not be authorised. These included if the relevant guidance had not been followed, or if the penalty was sought to be imposed under the wrong statutory provision.

53. Reasonable excuse would be considered in all cases where such an excuse was referred to by a taxpayer in correspondence. The case worker would then follow the guidance in that respect.

54. Having been referred to EM 5213 (means), Mrs Bull confirmed, and I accept, that if a hardship claim was made by a taxpayer, it would be considered. EM5213 (in its present format) states that the only situation in which it is possible to consider not charging a penalty is when HMRC have strong evidence to indicate that the person will not be able to pay it. For direct tax cases the guidance notes that it is best practice to consider ability to pay before the penalty is assessed or determined. However, it is necessary to examine all assets and liabilities; if a person is carrying on in business the guidance notes that "it is very unlikely that you will decide that they will not be able to pay." Mrs Bull herself would not have considered a hardship claim; that would have been sent to the "CIS functional lead". (It was noted earlier that Mr Kirkup was a member of the CIS FL team.) The FL could, in appropriate circumstances, authorise no penalty.

55. Mrs Bull was unable to speculate on what the result would have been if Mr Barrett had made a hardship claim. Following the letter from Mr Aspros of 17 July 2012, in which he had claimed that the request for information contained in Mrs Howe's letter of 28 June 2012 showed that HMRC did not understand the nature of Mr Barrett and his business, although in the normal course reminders for the documentation might be sent (and in this case Mrs Howe had clarified the documentation requirements in her letter of 16 August 2012), it was not considered that Mr Barrett should be given any further opportunity to provide information as to his financial means.

Board's Orders

56. Evidence in relation to Board's Orders, and the authorisation process for the determination of penalties in this case, was given by Mr Stephens, who has held policy responsibility in that area since 2001.

57. The term "Board's Orders" is given generically to the document by which the authorisation of HMRC officers for the purpose of exercising relevant powers under the tax machinery legislation is evidenced.

58. The Board's Order made on 10 March 2006 was as follows:

> "The Commissioners for Her Majesty's Revenue and Customs –
>
> (1) authorise any officer at Grade 6 or above for the purposes of section 100 of the Taxes Management Act 1970 other than in respect of penalties under –
>
> sections 93(2) and (4) and 93A(2) and (4) of that Act,
>
> section 99 of that Act, and
>
> paragraphs 17 and 18 of Schedule 18 to the Finance Act 1998;
>
> (2) revoke the authorisation given by the Commissioners for Inland Revenue dated 13th April 2004 relating to those purposes; and
>
> (3) declare that this authorisation is in addition to any others given for the purposes of section 100 of the Taxes Management Act 1970.
>
> *David Varney*
>
> *Mike Hanson*
>
> Commissioners for Her Majesty's Revenue and Customs
>
> 10th March 2006"

59. A further Board's Order was issued on 6 October 2011. That Order, made by Mike Eland and Dave Hartnett, Commissioners for Her Majesty's Revenue and Customs, was in the same terms as that of 10 March 2006, except that in paragraph (1), instead of authorising any officer at Grade 6 or above, the 2011 Order authorises "any officer". By mistake, it appears, the 2011 Order replicated precisely paragraph (2) of the 2006 Order, thus purporting to revoke the earlier 2004 Order, which had already been revoked by the 2006 Order. The evidence was that this had not been considered within HMRC to affect the legal position of the 2011 Order, by virtue of paragraph (3), which enabled the 2006 Order and the 2011 Order to co-exist.

60. The 2011 Order was thus intended to broaden the range of HMRC officers authorised to make determinations of the relevant penalties, including those under s 98A TMA. This followed the "Review of Powers" after the amalgamation of the former Inland Revenue and HM Customs & Excise and the introduction of new penalties legislation in Sch 24 FA 2007 and Sch 41 FA 2008.

61. The new penalties brought into force under those provisions did not require determination under s 100 TMA, so the Board's Orders did not apply. Nonetheless, HMRC decided to put in place internal guidance under which the application of the new penalties would require to be authorised by the case officer's line manager or an officer of similar standing.

62. It was also decided that the authorisation arrangements for the new penalties should be applied to the established penalties under s 100 TMA. That was the reason for the making of the 2011 Board's Order in different terms from those in the 2006 Order. The guidance to HMRC staff (at CH407050) sets out the authorisation arrangements. In normal circumstances, the authorising officer must be one level above the case worker; this is ordinarily the case officer's immediate line manager.

63. The process by which this decision to rationalise the authorisation requirements was that Mr Eland, one of the Commissioners, had asked for a review of those arrangements. It had been concluded that, because penalties could apply for a period spanning both the old and new legislation, it would be unwieldy for different authorisation arrangements to apply. The solution proposed, by means of a formal meeting and a number of *ad hoc* discussions, was that both penalties, old and new, should be authorised by a case worker's line manager, or an officer of similar standing, and that this should be achieved by a revision of the then applicable 2006 Board's Order, which confined authorisation to Grade 6 and above.

64. The decision was taken to apply the new authorisation arrangements to all penalties, except those expressly excluded from the scope of the Board's Order. Although Mr Stephens agreed that it would have been possible for penalties under s 98A TMA to have been so excluded, the decision was that line managers should be made wholly accountable for all decisions made by their teams.

The law

65. It will be convenient to set out separately the relevant statutory provisions in relation, first, to the determination of the amount of tax under-deducted by Mr Barrett from the payments he made to Mr Luke, and secondly to the penalties for failure to make CIS returns.

Tax under-deducted

66. Section 61 of the Finance Act 2004 ("FA 2004") provides that, on making a contract payment, a contractor must deduct from it a sum at a certain percentage (in this case accepted to have been 20% in the case of the payments to Mr Luke). The sum so deducted must, under s 62 FA 2004, be paid to HMRC, and is treated, in the case of an individual sub-contractor as being income tax paid in respect of the sub-contractor's relevant profits (s 62(2)).

67. Regulation 7 of the 2005 Regulations provides for payment to HMRC of amounts which a contractor was liable to deduct. However, in certain circumstances, HMRC may direct, under regulation 9(5), that the contractor is not liable to pay the under-deducted amount to HMRC. The terms of regulation 9(5) are:

> "An officer of Revenue and Customs may direct that the contractor is not liable to pay the excess to the Commissioners for Her Majesty's Revenue and Customs."

68. In this case, the circumstance in issue is that described by regulation 9(4) as Condition B. Regulation 9(4) provides:

> "Condition B is that—
>
> (*a*) an officer of Revenue and Customs is satisfied that the person to whom the contractor made the contract payments to which section 61 of the Act applies either—
>
> (i) was not chargeable to income tax or corporation tax in respect of those payments, or
>
> (ii) has made a return of his income or profits in accordance with section 8 of TMA (personal return) or paragraph 3 of Schedule 18 to the Finance Act 1998 (company tax return), in which those payments were taken into account, and paid the income tax and Class 4 contributions due or corporation tax due in respect of such income or profits; and
>
> (*b*) the contractor requests that the Commissioners for Her Majesty's Revenue and Customs make a direction under paragraph (5)."

69. Regulation 13 of the 2005 Regulations makes provision for the determination of amounts payable by a contractor and appeals against determinations. Regulation 13 relevantly provides:

> "(1) This regulation applies if—
>
> …
>
> (*b*) an officer of Revenue and Customs has reason to believe, as a result of an inspection under regulation 51 or otherwise, that there may be an amount payable for a tax year under these Regulations by a contractor that has not been paid to them, or
>
> (*c*) an officer of Revenue and Customs considers it necessary in the circumstances.
>
> (2) An officer of Revenue and Customs may determine the amount which to the best of his judgment a contractor is liable to pay under these Regulations, and serve notice of his determination on the contractor.
>
> (3) A determination under this regulation must not include amounts in respect of which a direction under regulation 9(5) has been made and directions under that regulation do not apply to amounts determined under this regulation.
>
> …
>
> (5) A determination under this regulation is subject to Parts 4, 5, 5A and 6 of TMA (assessment, appeals, collection and recovery) as if—
>
> (*a*) the determination were an assessment, and
>
> (*b*) the amount determined were income tax charged on the contractor,

> and those Parts of that Act apply accordingly with any necessary modifications, except that the amount determined is due and payable 14 days after the determination is made.
>
> …"

70. Within Part 5 of the TMA is s 50, which sets out the powers of the Tribunal on an appeal. Section 50(6) makes provision in the case of an assessment (and accordingly in the case of a determination under reg 13 of the 2005 Regulations):

> "(6) If, on an appeal notified to the tribunal, the tribunal decides—
>
> (*a*) that, the appellant is overcharged by a self-assessment;
>
> (*b*) that, any amounts contained in a partnership statement are excessive; or
>
> (*c*) that the appellant is overcharged by an assessment other than a self-assessment,
>
> the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good."

Penalties

71. It is common ground that Mr Barrett was required, for tax year 2006-07, to file an annual return no later than 44 days after the end of the tax year and, for 2007-08 to 2010-11, to make monthly returns, including nil returns, no later than 14 days after the end of each month.

72. Section 98A TMA applies penalties for late returns under each scheme:

> (a) Under the pre-2007 scheme, if an annual return was received after the filing date, a fixed penalty was imposed under s 98A TMA of £100 per month or part month, per return in respect of each batch (or part batch) of 50 sub-contractors.
>
> (b) Under the 2007 scheme, and so far as relevant in this case, if a return is received after the filing date, the contractor will be liable to late filing penalties, chargeable each month for each return outstanding after the filing date. The penalty is fixed at £100 per month or part month, per return in respect of each batch (or part batch) of 50 sub-contractors pursuant to s 98A(2)(a) and s 98A(3) TMA.

73. Section 100 TMA permits an authorised officer of HMRC to determine penalties under the Taxes Acts. Section 100 relevantly provides:

> "(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.

…

(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."

74. The right of appeal against a penalty is provided by s 100B TMA, which relevantly provides:

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

(2) On an appeal against the determination of a penalty under section 100 above section 50(6) to (8) of this Act shall not apply but—

(*a*) in the case of a penalty which is required to be of a particular amount, the First-tier Tribunal may—

(i) if it appears that no penalty has been incurred, set the determination aside,

(ii) if the amount determined appears to be correct, confirm the determination, or

(iii) if the amount determined appears to be incorrect, increase or reduce it to the correct amount …"

75. Section 118(2) TMA can deem a default not to have taken place if the taxpayer has a reasonable excuse. The section relevantly provides:

"… 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."

76. Under s 102 TMA, HMRC has a specific power to mitigate penalties:

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

Jurisdiction

77. As there is a dispute regarding this Tribunal's jurisdiction in relation to each of the grounds, apart from the consideration of reasonable excuse under Ground C, I start with a review of the authorities on the question of jurisdiction.

78. It is clear that the jurisdiction of this Tribunal is derived wholly from statute (see, for example, *Revenue and Customs Commissioners v Hok Ltd* [2013] STC 225, a case concerning penalties for which the statutory jurisdiction of the tribunal was to be found in s 100B TMA, and *Rotberg v Revenue and Customs Commissioners* [2014] UKFTT 657 (TC), where the relevant statutory jurisdiction was that in s 50(6) TMA).

79. In *Hok*, the Upper Tribunal held that this Tribunal did not have power to discharge penalties on the ground that their imposition was unfair. In doing so in that case the First-tier Tribunal had been acting in excess of its jurisdiction. In *Rotberg*, the question was whether, it being accepted that the tribunal's jurisdiction went only to determining how much tax was lawfully due, and not to the question whether or not HMRC should, by reason of some act or omission on their part, be prevented from collecting tax otherwise lawfully due, certain conduct of HMRC had given rise to a legitimate expectation as to the availability of a tax relief which in turn went to the amount of tax lawfully due. The Tribunal in that case held, at [109], that the First-tier Tribunal has no general supervisory jurisdiction and that accordingly the question of jurisdiction is not one of principle but one of statutory construction. It found, at [116], applying *Aspin v Estill* [1987] STC 723, that the jurisdiction of the Tribunal in cases of that nature was limited to considering the application of the tax provisions themselves, and on that basis that s 50(6) TMA fell to be construed so as to refer only to the case where the charge to tax made on the assessment or amendment exceeds that which the tax legislation provides. The jurisdiction did not extend to the process of determination.

80. I was referred to the recent decision of the Upper Tribunal (Proudman J) in *Lobler v Revenue and Customs Commissioners* [2015] UKUT 0152 (TCC). That case concerned a number of issues, including the construction of s 50(6) TMA and whether the First-tier Tribunal could entertain public law issues. In *Lobler* the question of construction of s 50(6) arose in the context of submissions that relevant legislation should be afforded an interpretation consistent with the European Convention on Human Rights ("ECHR"). Mrs Justice Proudman, at [107], described the word "overcharged" in s 50(6)(a) as primarily referring to being overcharged by reference to the tax legislation, and that there was no element of overcharge as that term is usually understood. It was held, at [109], that all of the tax had been properly imposed in accordance with the legislation and that the taxpayer's right of appeal was limited to the situation where the charge was an overcharge under the provisions of the legislation.

81. In *Lobler* the taxpayer, although succeeding on an unrelated ground, also failed to persuade the Upper Tribunal that the First-tier Tribunal had been wrong to decide that it did not have jurisdiction to deal with issues of public law in that case. It had been argued that HMRC could have decided not to make the changes to Mr Lobler's self assessments in reliance on their power of management in the tax system, and that the First-tier Tribunal had jurisdiction to decide any appeal against any conclusion or amendment made by a closure notice and that there was no restriction on which elements of public law it could apply in deciding such appeals.

82. The Upper Tribunal held that the First-tier Tribunal had no such jurisdiction. Having considered *Oxfam v Revenue and Customs Commissioners* [2010] STC 686, Proudman J at [126] referred to *Hok*, at [54], where the Upper Tribunal had distinguished the circumstances in *Oxfam*, in which the question, in a case concerning VAT, was of apportionment of input tax, which fell within the relevant statutory jurisdiction of the tribunal, from a question whether HMRC should be precluded from imposing or collecting penalties under s 100B TMA, or from collecting them. That, reasoned the tribunal in *Hok*, was a quite separate question of administration which was capable of being determined only by way of judicial review.

83. A separate public law challenge in *Lobler* was made on the basis that HMRC's exercise of its power to assess or amend the relevant tax returns had been unlawful in the light of the relevant human rights provisions. It was argued, first, that where an assessment or amendment of tax in a case of hardship would also breach the taxpayer's human rights there was an implied duty on HMRC not to assess or amend. HMRC had no power to make the relevant amendment without acting *ultra vires*. Secondly, in this context, it was argued that it was unlawful for a public authority to act in a way that was incompatible with an ECHR right, and that a court could accordingly grant such relief as was within its powers. That, it was submitted, provided a further basis on which the tribunal could grant relief under s 50(6) TMA. Relying on *Wandsworth London Borough Council v Winder* [1985] AC 461 and *Dennis Rye Pensions Fund v Sheffield County Council* [1998] 1 WLR, it was argued that for the First-tier Tribunal to assess principles of public law would not amount to an abuse of process.

84. Those arguments were rejected. It was held that public law questions were properly the subject of judicial review proceedings, and that the First-tier Tribunal did not have the power to grant relief in respect of an alleged unlawful or *ultra vires* act of HMRC.

85. It is not the case that public law arguments are the exclusive preserve of judicial review. In the VAT context, for example, it has been recognised that the statutory appeals jurisdiction of the First-tier Tribunal is, in certain circumstances, wide enough to encompass such arguments. Thus, in *Revenue and Customs Commissioners v Noor* [2013] STC 998, at [87], the Upper Tribunal (Warren J and Judge Bishopp) recognised that where the entitlement to a credit for input tax that had arisen under the VAT legislation depended on the exercise of a discretion on the part of HMRC under the VAT Regulations, that exercise could be examined within the tribunal's jurisdiction under s 83(1)(c) of the Value Added Tax Act 1994 ("VATA"). But the same did not apply to the exercise of administrative powers to treat something as input tax which was not input tax for which credit could be given under the legislation. That was the distinction identified by the First-tier Tribunal in *Rotberg* as enabling *Noor* to co-exist with the earlier judgment of Sales J in the High Court in *Oxfam*. There being no general supervisory jurisdiction, the question is one of construction of the provision providing the tribunal's jurisdiction.

86. In *Wandsworth v Winder*, Mr Winder occupied a flat let by Wandsworth council on a secure weekly tenancy. Pursuant to their powers under the Housing Act 1957,

the council resolved to increase the rent, and served notices on Mr Winder. In proceedings by the council to cover the unpaid increases in rent, Mr Winder contended that the council's resolutions and notices of increase were *ultra vires* and void and counterclaimed for a declaration to that effect. The council applied to strike out the defence and a counterclaim as an abuse of process of the court, arguing that its conduct could be challenged only on judicial review.

87. The House of Lords held that it was a paramount principle that a private citizen's recourse to the courts for the determination of his rights was not to be excluded except by clear words, and the availability of judicial review did not affect a citizen's right to challenge the decision of a local authority in the course of defending an action such as that in the case before it. In doing so it distinguished the case from the earlier one of *O'Reilly v Mackman* [1983] 2 AC 237, in which the plaintiffs in the action were prisoners whose complaint was that they had been ordered by the Board of Visitors of Hull Prison to forfeit which had not concerned the infringement of private law rights, and it had been the prisoners who had initiated the proceedings.

88. At p 509D, Lord Fraser of Tullybelton, with whom all the other law lords agreed, made the point that arguments for protecting public authorities against unmeritorious or dilatory challenges to their decisions had to be set against the arguments for preserving the ordinary rights of private citizens to defend themselves against unfounded claims. He said, at p 509E-F:

> "It would in my opinion be a very strange use of language to describe the respondent's behaviour in relation to this litigation as an abuse or misuse by him of the process of the court. He did not select the procedure to be adopted. He is merely seeking to defend proceedings brought against him by the appellants. In doing so he is seeking only to defend an action against him on the ground that he is not liable for the whole sum claimed by the plaintiff. Moreover he puts forward his defence as a matter of right, whereas in an application for judicial review, success would require an exercise of the court's discretion in his favour."

89. The first point to make in this connection is that I do not consider that *Wandsworth v Winder* can be distinguished purely on the basis that it concerned public law arguments raised by a defendant to an action, and not by an appellant. I agree with Judge Mosedale in *L H Bishop Electric Company Ltd and others v Revenue and Customs Commissioners* [2013] UKFTT 522 (TC), at [72] – [73], that an appellant to a tax appeal can be equated with a defendant in a civil action: such an appellant is effectively in the position of a defendant to an assessment or determination made by HMRC. His means of defending such an assessment is provided by way of an appeal to the tribunal.

90. Secondly, and on the other hand, *Wandsworth v Winder* was not a case on jurisdiction, but on abuse of process. There was no doubt that the county court in that case had jurisdiction to consider the issues raised by Mr Winder; the only question was whether he was to be permitted to raise them. By contrast, the question for a

statutory tribunal of the nature of this tribunal is whether the statutory language gives the tribunal the jurisdiction to consider public law arguments that are raised.

91. That was recognised by the tribunal in *Bishop*. At [56], for example, it prefaced its extensive review of the relevant authorities by describing its task as to apply the normal rules of statutory construction to determine whether and to what extent, in giving the tribunal jurisdiction, Parliament had intended it to consider public law principles. Having considered the authorities, including *Wandsworth v Winder*, the tribunal decided, at [139], that s 83 VATA was to be construed so that, in considering an assessment, the tribunal may consider whether the prior exercise of a discretion by HMRC was lawful in the public law sense. That was to be contrasted, however, with the exercise of a discretion not to exempt a taxpayer from a liability that has arisen under the law, where a challenge could be made only by judicial review (*Bishop*, at [141]). The statutory provision for which the scope of the jurisdiction required to be determined in that case was s 83(1)(zc). The tribunal held, at [148], that it had jurisdiction to consider whether HMRC's decision as to the liability of the appellants to file VAT returns online was correct; that included jurisdiction to consider whether HMRC's decision was lawful. It did not, however, include jurisdiction over whether HMRC ought to have exercised a discretion to exempt the appellants from such a liability.

92. The fact that the question is one of statutory construction of individual provisions conferring jurisdiction on the tribunal means that different provisions may permit of a broader or narrower scope of public law jurisdiction. Although therefore cases decided in other contexts, whether within or outside the sphere of the tribunal's own jurisdiction, are instructive of a general approach, the focus must necessarily remain on the particular statutory provisions required to be construed.

93. In this case there are two such provisions. First, there is s 50(6) TMA, for which the relevant authorities are *Aspin v Estill*, in the Court of Appeal, and *Lobler* in the Upper Tribunal. Although I accept that the remarks on the question of public law jurisdiction in *Lobler* may strictly be regarded as *obiter*, the case having been decided in the basis of rectification alone, those findings have strong persuasive authority. Accordingly, I find that in respect of s 50(6) this tribunal's jurisdiction is limited to determining whether, under the provisions of the legislation, there has been an overcharge (or, as the case may be, undercharge) to tax. That involves consideration of the statutory requirements for a valid assessment or determination, as well as the question of the proper liability to tax, but it does not enable the tribunal to consider public law questions.

94. That conclusion is unaffected by the fact, as submitted by Mr Gordon, that there had never been any doubt, in the time before self assessment, that the question whether there had been a discovery within what was then s 29(3) TMA could be determined by the relevant tribunal. Nor is there any doubt that the application of the provisions of the current s 29 falls within the tribunal's jurisdiction. The reason that is the case is that those are matters that do not involve questions of public law, but are simply a matter of determining whether the necessary conditions for the establishment of a taxpayer's liability under the legislation have been met. If they have not, then

any purported charge to tax would be an overcharge and thus squarely within the scope of s 50(6) TMA.

95. The second relevant provision, which applies to the penalties in this case, is s 100B. On that there is clear and binding authority of the Upper Tribunal in *Bosher*. There the tribunal, following *Hok*, described, at [17], the jurisdiction of the First-tier Tribunal in relation to fixed penalties under the CIS as being confined to the setting aside of a penalty that had not in fact been incurred, or to correct a penalty which had been incurred but had been imposed in an incorrect amount. It found, at [46], that as a matter of ordinary statutory construction the powers of the First-tier Tribunal under s 100B(2)(a)(iii) TMA (to determine whether a penalty was "incorrect") relate only to the correctness of the amount of the penalty ascertained in accordance with the provisions of s 98A(2). Any arguments as to mitigation and proportionality may only be made by way of judicial review.

96. With those principles in mind, I turn to consider the grounds of appeal.

Ground A – appeal against regulation 13 determination

97. There is no dispute that Mr Barrett failed to deduct tax when making the relevant payments to Mr Luke, and failed to pay the relevant amounts to HMRC. The amount of £1,894.55 is accepted as being the total of the amounts for the relevant tax years that Mr Barrett, as a contractor for the purpose of the 2005 Regulations, should have paid to HMRC.

98. In those circumstances, subject to regulation 9(5), there can be no doubt that the amount of £1,894.55 was properly determined under regulation 13.

99. The dispute under Ground A is on the failure, according to Mr Barrett, of HMRC to make a direction under regulation 9(5) on the basis that Condition B has been shown to be satisfied. If such a direction had been made, there would, it is submitted, be no amount for which a determination could have been made, as Mr Luke has paid the tax himself.

100. That submission gives rise to two questions, one of construction and the other of fact.

Construction of the legislative provisions

101. On the question of construction, Mr Gordon acknowledged that, according to its plain terms, regulation 13(3) was an obstacle to a determination under regulation 13(2) taking account of tax paid by Mr Luke, where no direction was made in that respect under regulation 9(5) before the determination. He argued, however, that the legislation should be construed so as to enable a direction under regulation 9(5) to be made after the determination, and for that direction to reduce or eliminate the amounts otherwise determined under regulation 13(2).

102. The starting point for this analysis is regulation 9(4), which describes Condition B. Miss McCarthy pointed out that this requires the sub-contractor to have made his tax return "in accordance with s 8 TMA". That, it was argued, could only be the case if the return had been submitted within the relevant time limits in s 8(1D) to (1H), which set out the usual time limits with some limited exceptions. If a return were made outside those time limits it could not be "in accordance with" s 8, and Condition B could not be satisfied.

103. Mr Gordon submitted that the tribunal should not apply an overly literal interpretation of the statutory regime, arguing that the reference in regulation 9(4) to s 8 TMA should be treated as a reference only to the making of the return, and not to requiring time limits in that section to have been observed. He pointed to an unfair disadvantage to which a contractor might be put depending on the time at which a sub-contractor had complied with his own tax obligations. There might be a delay in the sub-contractor making a return which, on HMRC's case, would preclude tax actually paid by the sub-contractor from being taken into account in determining the contractor's liability under regulation 13. Mr Gordon invited me to take notice of the position before the self assessment regime came into force, when he said it was common for tax returns to be made after the usual time limit of 30 days from the date of issue of a notice from the Revenue. On HMRC's argument, he submitted, the predecessor to regulation 9(4) would almost never have been satisfied.

104. I do not accept that argument. Leaving aside for the moment arguments in relation to human rights, which may where relevant affect the construction of the legislation, it is clear that the requirement of Condition B that a return be made "in accordance with" s 8 carries with it all the legislative requirements of s 8. Applying ordinary principles of construction, no other interpretation is in my view possible. Taking a purposive approach, it is clear that the whole basis of the CIS regime is to secure compliance with tax obligations. In the context of Condition B, therefore, that must include compliance with all elements of s 8.

105. Mr Gordon argued that regulation 9(4) should be construed so as to require, in circumstances where Condition B is satisfied, HMRC to direct that the contractor is not liable to pay the amount under-deducted, and that regulation 13(3) should be construed so that any such direction, whenever made, should have the effect of reducing or eliminating the determination under regulation 13(2).

106. Mr Gordon submitted that the effect of an overly-literal interpretation of the relevant provisions was that Mr Barrett was effectively suffering a penalty of 100% for his failure to deduct tax and pay it over to HMRC. Mr Barrett had paid Mr Luke gross, thereby including within that payment the amount of tax he should have deducted. By being made liable to pay that same amount to HMRC, he was incurring a double expense (Mr Gordon described it as a "double deduction"). On the basis that Mr Luke had paid the same tax to HMRC, Mr Gordon submitted that this would, if HMRC's construction of the relevant provisions were correct, result in a "double recovery" on the part of HMRC. The citizen, Mr Barrett, would be disadvantaged; the state, in the form of HMRC, would be advantaged.

107. Mr Gordon argued that, as a determination under regulation 13 can be subject to an appeal before the tribunal, the matter of the correct amount of the liability of a contractor to tax could not be regarded as final until the appeal process had concluded. Until that time there was no amount finally determined under the regulation. Regulation 13(3) could be construed so as to permit a direction made under regulation 9(5) after the regulation 13(2) determination, but otherwise during the appeal process, to be taken into account in the final determination by the tribunal. That, Mr Gordon argued, would be a perfectly sound interpretation of the statutory regime and give rise to a perfectly fair and sensible result.

108. Applying normal principles of construction, which includes taking a purposive approach, I can see no merit in Mr Gordon's arguments.

109. In this regard I accept the submission of Miss McCarthy that this tribunal has no jurisdiction to adjust the amount determined by HMRC under regulation 13(2) otherwise than in accordance with the statutory provisions themselves. That, as I have described, is the extent of this tribunal's jurisdiction under s 50(6) TMA. Thus, whilst the tribunal must take account of the effect of regulation 13(3) in excluding from the amount otherwise determined under regulation 13(3) amounts in respect of which a regulation 9(5) direction has been made, once the regulation 13(2) determination is made, the tribunal is precluded from taking into account any subsequent direction that might have been made under regulation 9(5), and *a fortiori* any amount that could have been the subject of a direction, but in respect of which no direction has been made.

110. Ms McCarthy referred me to *Revenue and Customs Commissioners v Dhanak* [2014] UKUT 0068 (TCC) in the Upper Tribunal (David Richards J). Although it concerns different provisions, there are helpful parallels between the two cases, and the principles on which David Richards J determined the appeal in that case can, by analogy, be applied to this case.

111. *Dhanak* concerned the relationship between a provision, s 386 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA"), which charged to tax sums paid by an employer in accordance with an approved retirement benefits scheme with a view to the provision of relevant benefits for an employee, and s 392 of that Act, under which relief could be obtained in certain circumstances, where no benefits had in fact been paid, and an event had occurred such that no such benefit would be paid. Section 392 required an application by the employee, or by the employee's personal representatives, and relief had to be given if an HMRC officer was satisfied that the relevant conditions for the relief had been met.

112. *Dhanak* involved a question of jurisdiction. The appeal to the Upper Tribunal was from the refusal of the First-tier Tribunal to strike out Mr Dhanak's appeal on the ground that the refusal by HMRC of his claim for relief under s 392 was outside the jurisdiction of the First-tier Tribunal and could be challenged only judicial review. Mr Dhanak had also issued a claim for judicial review, which was before the Upper Tribunal at the same time.

113. There was no specific statutory right of appeal against a refusal of relief under s 392. It was argued for Mr Dhanak, in terms which mirror certain of Mr Gordon's submissions in this case, that the effect of s 50(6) TMA was that the assessments under s 386 ITEPA remained open, and the express requirement in s 386(7) that the availability of s 392 relief be taken into account in fixing the taxpayer's liability to tax meant that, in accordance with the normal jurisdiction of the First-tier Tribunal to determine such liability, the First-tier Tribunal had jurisdiction to consider a refusal of s 392 relief made up to the time of the hearing. That was the argument that had been accepted by the First-tier Tribunal in *Dhanak*.

114. In the Upper Tribunal, however, the argument was rejected. In doing so, David Richards J emphasised the need to discern a legislative intention that a refusal of an application for relief under s 392 should be open to challenge in a statutory appeal to the First-tier Tribunal. He found that the absence of a provision for an appeal against a refusal of relief under s 392 weighed strongly against a finding that there was such a legislative intention. There would have been expected to have been a clear statement of the jurisdiction of the tribunal, including a power for the tribunal to substitute its own view. That jurisdiction could not be conferred by s 386(7), the straightforward purpose of which was to enable HMRC to relieve the taxpayer from the obligation to pay the tax under s 386 to the extent that s 392 relief had been given before the tax had been assessed.

115. In common with s 392 ITEPA, there is no express right of appeal against a refusal to grant relief under regulation 9(5) of the 2005 Regulations where HMRC are not satisfied that Condition B is met. That is in contrast to the position where the refusal is on the basis that Condition A (which looks to whether reasonable care was taken to comply with the CIS rules, and error in good faith or genuine belief that s 61 FA 2004 did not apply) is not met; an express right of appeal is provided in that regard by regulation 9(7) and (8).

116. That there is no right of appeal against a refusal to make a direction under regulation 9(5) on the basis of HMRC not being satisfied that Condition B had been met was the view taken by the First-tier Tribunal (Judge Raghavan and Mr Gillett) in *Hoskins v Revenue and Customs Commissioners* [2012] UKFTT 284 (TC), with which I respectfully agree. Such a challenge can only be made by judicial review. The tribunal in that case went on to consider whether any avenue of appeal could be afforded through the determination made under regulation 13(2) and the appeal right under regulation 13(5). It held that it could not, essentially having regard to the effect of regulation 13(3).

117. In my judgment, the absence of appeal rights in relation to a refusal by reference to Condition B points clearly against there being any legislative intention that such a refusal should be capable of being challenged by way of a statutory appeal, whether directly or indirectly by way of appeal against the determination under regulation 13(2). For the reasons I have given, which in my view accord with the reasoning of the Upper Tribunal in *Dhanak*, applying a purposive construction of the relevant provisions, s 50(6) TMA does not provide this tribunal with the jurisdiction to reduce the charge to tax on Mr Barrett otherwise than in accordance with the statutory

provisions themselves. In this case, the regulation 13(2) determination having been made at a time when no direction had been given under regulation 9(5), the effect of regulation 13(3) is to preclude any adjustment to the determination by reference to regulation 9(5).

Human rights

118. As an alternative to a construction of the statutory provisions in Mr Barrett's favour under normal domestic principles of construction, Mr Gordon submitted that the stance taken by HMRC breached Mr Barrett's human rights, such that reliance could be placed on *Ghadian v Godin-Mendoza* [2004] 2 AC 40 in order to obtain a reading of the legislation compliant with the ECHR.

119. Although that claim was not particularised, Mr Gordon confirmed in argument that it was based both on Article 1, Protocol 1 (A1P1) and Article 6 of the Convention.

120. I start with A1P1, which provides:

> "(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> (2) The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

121. The essence of Mr Gordon's argument in this regard is that, if the legislation does not make provision for relief in the circumstances of Mr Barrett's case, that imposes on him a disproportionate penalty, in that the contractor is effectively punished for the compliance failures of the sub-contractor, who would have no incentive to bring his affairs up to date. Added to that, not only is the contractor who has failed to deduct tax and made a gross payment to the sub-contractor effectively subject to a 100% penalty, the unfairness is compounded by the fact that HMRC have recovered tax from the sub-contractor and can have no legitimate cause to pursue Mr Barrett for the same amount.

122. As Mr Gordon's submissions implicitly recognise, any argument in this regard must be based on proportionality. That is because the justification for the levying of taxes which is available under A1P1 must comply with the principle of proportionality. The relevant measures must be appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question, and when there is a choice between several measures recourse must be had to the least onerous, and the disadvantage caused must not be disproportionate to the aims pursued (see, for example, *R v Minister of Agriculture, Fisheries and Food, ex parte Federation Européene de la Santé Animale and others* [1990] ECR I-4023, at [13]).

123. Contrary to Mr Gordon's submission, I do not consider that there is any basis for a claim in this case that the effect of the legislation is disproportionate to its aims. It is plain that the aim is to secure compliance. To that end it provides for contractors, in relevant circumstances, to deduct tax from payments to sub-contractors and to pay that tax to HMRC. In the normal case that tax deduction will represent a credit for the sub-contractor against his own tax liability. But if no deduction is made, there can be no such credit, and the sub-contractor will remain liable. In those circumstances there is certain provision for tax paid by the sub-contractor to reduce the liability of the contractor for the same amount, but that cannot apply after the determination of the contractor's own liability.

124. The foundation of Mr Gordon's submission must be that the CIS can only be proportionate if it enables, in all circumstances, not only a credit for the sub-contractor for tax deducted by the contractor, but also a credit for the contractor for tax actually paid by the sub-contractor. That, in my view, cannot be accepted. The aim of the CIS is to provide for a tax payment mechanism, in the relevant circumstances, that depends on the contractor being obliged to deduct tax and pay it to HMRC, with credit in that respect for the sub-contractor. It makes provision, quite properly, for certain cases where tax has not been deducted or paid, but where the sub-contractor has nonetheless complied with his obligations. But a contractor who has failed to comply with the basic obligations cannot succeed in a claim that the absence of provision in the legislation to relieve him from his failure where he has wrongly paid his sub-contractor gross, and by reason of that is out of pocket, is disproportionate.

125. The State has a wide margin of appreciation in legislating for the payment of taxes. That margin of appreciation is broader in the case of primary legislation that it is for secondary legislation (see *R (on the application of Sinclair Collis Ltd) v Secretary of State for Health* [2011] EWCA Civ 437, at [23]). In this case, although supplemented by the 2005 Regulations, Mr Barrett's liability arose under primary legislation, namely ss 61 and 62 FA 2004. But whatever margin of appreciation would be applicable in this case, it is clear to me, for the reasons I have stated, that Mr Barrett cannot succeed in a claim that it breaches his A1P1 rights. It cannot be said in this case that the interference with Mr Barrett's A1P1 rights is "devoid of reasonable foundation" (see *Gasus and National Provincial Building Society and others v United Kingdom* (1998) 25 EHRR 127).

126. I also reject any recourse to Article 6 of the Convention (right to a fair trial), which was relied upon by Mr Gordon in the case, as I have found, that this tribunal does not have jurisdiction to reduce the charge to tax on Mr Barrett by reference to tax said to have been paid by Mr Luke.

127. The scope of Article 6 is not without limitation. It applies, in terms, to the determination of civil rights and obligations or of any criminal charge against a person. One of those criteria must be present for Article 6 to be applicable. Whereas penalties or surcharges in relation to tax are regarded, for Convention purposes, as criminal in nature (see *Jusilla v Finland (Application No 73053/01)* [2009] STC 29) and thus subject to Article 6, the assessment or determination of tax is not a criminal

matter, and it also falls outside the scope of civil rights and obligations (*Ferrazini v Italy* (2000) 34 EHRR 1068, [2001] STC 1314, at [29]; see also *R (on the application of ToTel Ltd v First-tier Tribunal (Tax Chamber) and another* [2011] STC 1485).

128. Accordingly, there is no basis for a complaint by Mr Barrett in this respect that the absence of jurisdiction gives rise to a breach of an Article 6 right. Although Mr Gordon attempted to characterise the effect on Mr Barrett as being effectively penal, it is not of a nature capable of falling within the criminal scope of Article 6.

129. On the basis of my conclusion that there has been no breach of Mr Barrett's Convention rights, it is unnecessary for me to consider whether the legislation may be read in a Convention-compliant manner. In my judgment the legislation is compliant, and no exercise of construction as is permitted by *Ghadian* is called for in this case.

Was Condition B satisfied?

130. On my view of the scope of this tribunal's jurisdiction, this is not a question for consideration. However, for completeness, I should say that the answer to the question is plainly no.

131. Apart from Mr Barrett's own recollection of what he had been told by Mr Luke, the only evidence in this respect relied upon by Mr Barrett was the letter from HMRC to Mr Luke dated 5 March 2014, which I have summarised at [25]. Far from supporting Mr Barrett's case, however, that letter serves to confirm that Mr Luke had not filed his relevant tax returns within the statutory time period, and consequently, according to my earlier finding, had not "made a return of his income or profits in accordance with section 8 of TMA", and so had failed the test in regulation 9(4)(a)(ii) of the 2005 Regulations.

132. Furthermore, the letter does not confirm that the relevant tax and national insurance contributions had been paid. There is no indication as to what income or profits had been included in the returns, nor the basis upon which HMRC had made determinations.

133. I find, therefore, that Condition B has not been shown to have been satisfied.

Grounds of appeal relating to penalties

134. Ground A, which I have considered above, is the only ground of appeal which relates to the determination made under regulation 13 of the 2005 Regulations. The other remaining grounds of appeal, which are Grounds B, C, D and E, concern the penalty determination made under s 100(1) TMA by reference to s 98A(2). Of those grounds, one (Ground C- reasonable excuse) involves no jurisdictional issue. I shall accordingly consider that ground after those for which there is a question of this tribunal's jurisdiction.

Ground B – HMRC failed to exercise discretion

135. It was common ground that s 100(1) TMA does not impose a mandatory statutory requirement on HMRC to determine a penalty in all cases. Mr Gordon submitted that the terms of s 100B(1) were wide enough to encompass an argument that HMRC had failed to consider their powers of mitigation, and questions of the hardship to be suffered by Mr Barrett, at the time of determining the penalty, and that accordingly the penalty determinations were flawed.

136. I do not accept that this tribunal has such a jurisdiction. As I have determined, the powers of this tribunal under s 100B(2)(a)(iii) TMA to determine whether a penalty is incorrect relate only to the correctness of the penalty ascertained in accordance with the provisions of s 98A(2). That does not include jurisdiction to consider the exercise of HMRC's discretion in relation to the determination of the penalty, nor in relation to its mitigation. The power to mitigate, as Miss McCarthy submitted, is a separate power given to HMRC under s 102, from which there is no right of appeal to the tribunal, and for which, as the Upper Tribunal has decided in *Bosher*, at [59], a taxpayer's Convention rights are adequately protected by his right to apply for permission to bring judicial review.

137. By way of separate argument, Mr Gordon relied on the evidence of Mrs Bull that the guidance in COG914180, and by reference EM5201 – 5255, was mandatory, and that she did not have a discretion to disregard the guidance, as showing that there had been no exercise of a discretion at all in this case, and that the requirements of s 100(1) had not therefore been met. Even if such a question were within this tribunal's jurisdiction, in my view that argument would be bound to fail. I do not consider that it can be argued that the discretion vested in HMRC under s 100(1) is at large. There must be a proper basis on which it may be determined that a penalty otherwise chargeable should not be charged or should be charged in a lesser amount. The HMRC guidance sets out particular circumstances where such a course may be appropriate: these include the taking account of cases where the tax assessments on which penalties are based are themselves excessive (and so include an element of "in-built penalty") (EM5212) and the consideration of the taxpayer's means, where the guidance is that the "only situation in which you may consider not charging a penalty is when you have strong evidence to indicate that the person will not be able to pay it". In following that guidance, therefore, an officer of HMRC would properly be exercising the discretion afforded by s 100(1).

138. In this case, the only relevant circumstance that would have been applicable on the determination of the penalty is that of hardship. That was, as I have found, a matter that HMRC raised with Mr Barrett and Mr Aspros. Neither Mr Barrett nor Mr Aspros provided HMRC with any proper evidence of hardship, and in my judgment there can be no proper criticism of HMRC's conduct in that respect.

Ground D – penalties are disproportionate

139. As I have explained earlier, Mr Gordon accepts that this tribunal is bound by *Bosher*, but he reserves his position on the question of proportionality, in case this case goes further. As things currently stand, however, this tribunal has no jurisdiction

to consider whether the penalties imposed on Mr Barrett were disproportionate, and if they were to set them aside on that basis.

140. Although I was urged to make findings on proportionality, I do not consider, in the absence of jurisdiction, that it would be appropriate for me to do so. I would be doing no more than to repeat what the Upper Tribunal said in *Bosher* at [63] – [67], and would be in danger – in the face of binding authority - of trespassing on the jurisdiction of the court or tribunal that might be required to consider the same question on judicial review.

Ground E – HMRC officer not duly authorised

141. For the reasons I have given above, in my judgment this tribunal has no jurisdiction to consider the question whether the Board's Order of 6 October 2011 was *ultra vires* or otherwise irrational or contrary to s 100(1) TMA. The language of s 100(1) does not, in my view, permit this tribunal to go beyond the correctness of the amount of the penalty according to the statutory provisions. Questions of internal HMRC procedure, including questions as to the procedure for the giving of authority to individual HMRC officers to exercise HMRC's statutory powers are classically the territory for judicial review, and there is nothing in s 100(1) to extend this tribunal's jurisdiction to an enquiry of that nature.

142. In submitting that this tribunal does have jurisdiction in this respect, Mr Gordon placed considerable reliance on *Wandsworth v Winder*. However, I do not consider that case assists him. It does not, in my view, provide authority for a general proposition that a statutory appeal process must permit a collateral attack on what is asserted to be an unlawful preceding internal act. *Wandsworth v Winder* makes clear that in circumstances where a citizen is challenging a decision of a public authority in the course of defending an action, the availability of judicial review will not be capable of excluding from the proceedings in that action a challenge on public law grounds by reason of abuse of law or that the challenge in those proceedings would be contrary to public policy. But that question arises only in a case, such as in *Wandsworth v Winder* itself, where the court or tribunal itself would otherwise have jurisdiction. In those circumstances, the fact that the public law issue could be addressed by judicial review will not oust a pre-existing jurisdiction of the relevant court or tribunal. On the other hand, where the jurisdiction of the court or tribunal is limited by statute, there is nothing in *Wandsworth v Winder* that can provide it with jurisdiction outside the terms of the relevant statute.

Ground C – reasonable excuse

143. It follows from my conclusions in relation to Grounds B, D and E that the only ground on which this tribunal has jurisdiction to determine Mr Barrett's appeal against the penalties is Ground C. The basis of that ground is that Mr Barrett is to be regarded, by s 118(2) TMA, as not having failed to make the relevant returns because he had a reasonable excuse for not making them. That is the extent of the dispute under this ground: HMRC do not argue that Mr Barrett ceased to have a reasonable

excuse and delayed unreasonably, such that caveat contained in the second part of s 118(2) would come into play.

144. The case put by Mr Gordon in this respect is a simple one. Mr Barrett, he argued, became self-employed in 2000 or 2001. He appointed Mr Aspros of G T Aspros & Co as his accountant to deal with all relevant filings, and to provide him with relevant advice. Mr Barrett had no reason to believe that Mr Aspros would be unable to provide him with all the services he needed. In the event, Mr Aspros let Mr Barrett down, but that was no fault of Mr Barrett, who had done what would reasonably have been expected of a taxpayer trying to comply with his statutory obligations. Mr Barrett is such a taxpayer; his otherwise good compliance record is unchallenged. Furthermore, it would be unreasonable to expect Mr Barrett to have taken further steps unless there had been a reason for him to have done so.

145. In support of that argument, Mr Gordon referred me to the decision of the special commissioner (Mr Shipwright) in *Rowland v Revenue and Customs Commissioners (SPC00548)* [2006] STC (SCD) 536. In that case the taxpayer, Mrs Rowland, appealed against a surcharge in respect of an underpayment of tax. The tax in question had arisen as a result of Mrs Rowland's return, prepared by specialist accountants, disclosing a tax liability, reduced by virtue of a film partnership loss, of a lesser amount than ought to have been declared. The special commissioner, at [20], found that it was "sensible and reasonable" for Mrs Rowland to employ and rely upon persons whom she reasonably believed to have the relevant specialist knowledge and expertise that she did not have personally. That advice, it appeared, had turned out to be incorrect, but that in itself did not prevent Mrs Rowland from having a reasonable excuse.

146. Having considered the relevant provision conferring relief for a reasonable excuse in that case (s 59C(9) TMA), and noting (in contrast to certain other provisions of a similar nature) that it did not include any exclusion for reliance on a third party, the special commissioner concluded that it was reasonable for Mrs Rowland to have relied on her accountants, and that it was that reliance that had led to the underpayment of tax. That in turn led to the conclusion that, in the particular circumstances of that case, Mrs Rowland had a reasonable excuse for the late payment of tax.

147. Mr Gordon also showed me an extract from an HMRC manual dealing with the question of negligent conduct in the context of penalties in which it is stated that it can be assumed that a reasonable person would, for example, seek professional help with matters, such as the preparation of accounts, which they were unable to cope with satisfactorily alone.

148. The decision of the special commissioner in *Rowland*, and a similar decision in *The Research and Development Partnership Ltd v Revenue and Customs Commissioners* [2009] UKFTT 328 (TC) ("*RDP*"), concerning "complicated questions of research and development tax credits", were considered by this tribunal (Miss Redston, presiding member) in *Ireton v Revenue and Customs Commissioners* [2011] UKFTT 639 (TC), a default paper case decided without a hearing. That case

concerned the failure of a contractor under CIS to make end of year returns. The tribunal distinguished *Rowland* and *RDP* on the basis that, unlike the more complex issues with which those cases were concerned, the making of the end of year returns in *Ireton* was a straightforward task, and that accordingly, even if Mr Ireton's accountant had had a contractual obligation to advise him on the scope of his CIS responsibilities and had failed to do so, that did not constitute a reasonable excuse for the non-submission of the forms.

149. In reaching that conclusion in *Ireton*, the tribunal also referred to the earlier case of *Richfield Fashion Co Ltd v Revenue and Customs Commissioners* [2011] UKFTT 80 (TC), in this tribunal (Judge Trigger), a case also decided without a hearing. In that case the taxpayer argued that the failure to file a P35 return was a failure of the taxpayer's agent, who had incorrectly believed that the return had been filed on time. The tribunal found that the taxpayer was solely responsible for filing the return on time and that even though the responsibility for such filing had been delegated, the taxpayer was under a duty to ensure that the agent had done all that was required.

150. In *B&J Shopfitting Services v Revenue and Customs Commissioners* [2010] UKFTT 78 (TC), a third default paper case, the tribunal (Judge Mosedale) found that the taxpayer had a reasonable excuse for the late filing of a partnership return which his agent had failed to file having erroneously relied on mistaken advice given by the HMRC helpline. However, in the context of the reasonable excuse provisions of s 93A(7) TMA, which does not contain any exclusion for reliance on a third party, Judge Mosedale said (at [12]):

> "Reliance on a third party as a matter of policy will not normally be a reasonable excuse because a taxpayer should not be able to avoid his liabilities by passing them on to someone else."

151. In a case involving the non-submission of CIS returns between April 2007 and January 2009, *Turner v Revenue and Customs Commissioners* [2014] UKFTT 1124 (TC) (Judge Hacking), it was held that a contractor, who had provided details to his accountant of the monies earned by each of his subcontractors and sent a cheque each month to his accountant for the total tax payable under the CIS, did not have a reasonable excuse for the failure to submit the returns in the relevant period.

152. Two particular points must be made about the decision in *Turner*. The first is that para 23(2)(b), Sch 55 FA 2009 (where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure) cannot be relied upon in determining cases outside those provisions. It was, in my respectful view, wrong for the tribunal to have said, at [11], that those provisions "simply restate the law as previously understood".

153. The second is even more fundamental. At [10], the tribunal referred, with apparent approval, to the view of HMRC that a reasonable excuse must be some circumstance which is both "unforeseen and beyond the control of the taxpayer". That reflects HMRC's own published guidance which is, as this tribunal has pointed out in a number of cases, notably in *Electrical Installation Solutions Ltd v Revenue and Customs Commissioners* [2013] UKFTT 419 (TC), wrongly places reliance on

the dissenting judgment of Scott LJ in *Steptoe v Customs and Excise Commissioners* [1992] STC 757. It is inappropriate for HMRC to seek to rely on that formulation as representing the state of the law on reasonable excuse.

154. The test of reasonable excuse involves the application of an impersonal, and objective, legal standard to a particular set of facts and circumstances. The test is to determine what a reasonable taxpayer in the position of the taxpayer would have done in those circumstances, and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard. Whilst other cases in the First-tier Tribunal may give an indication of the approach that has been taken in the particular circumstances at issue, those cases cannot be regarded as providing any universal guidance.

155. Tribunals should, in particular, be cautious in making generalised statements concerning perceived categories of case, and equally circumspect about judging what is reasonable as a matter of the legal test by reference to perceived policy. Although the relevant statutory provisions may be subject to a purposive construction, that is not the same as the setting of parameters for the application of a reasonable excuse provision by reference to the tribunal's own perception of underlying policy. In the case of s 118(2) TMA, with which this case is concerned, and which contains no reference to reliance on third parties, it is not in my view possible or permissible to discern any underlying purpose or policy with regard to such reliance from the statutory language.

156. Nor do I consider that there can be any principled distinction between cases which involve complex or "arcane" provisions of tax law, and those which may be regarded as more commonplace. That is nothing more than one of the circumstances to be taken into account in the application of the objective standard.

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.

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.

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.

165. Accordingly, I conclude that Mr Barrett had a reasonable excuse for the non-filing of the CIS returns for which the penalties under s 98A TMA have been determined.

Decision

166. For the reasons I have given:

(1) I dismiss Mr Barrett's appeal against the determination under regulation 13(3) of the 2005 Regulations in the sum of £1,894.55.

(2) I allow Mr Barrett's appeal against the penalties determined under s 98A TMA, and set aside those determinations.

Application for permission to appeal

167. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision (including the decision set out in the Appendix) 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

Text of oral decision on 1 June 2015 as to permitted scope of Ground E

1. The question for determination is the scope of Mr Barrett's Ground E. That ground, as expressed in Mr Barrett's Response to HMRC's strike out application (at para 33(e)), was that "the officer making the determination was not duly authorised for the purposes of s 100(1) TMA".

2. That is clearly a ground that may have a narrow or wide scope. It became clear, in the course of further correspondence, that some clarification was required, both as to Mr Barrett's position with respect to Ground E and its scope, and to the requests for information as set out in para 31(a) of the Response, which was for:

> "… full disclosure of the facts and considerations leading to the signing of [the 2011 Board's Order] including but not limited to a copy of all non-privileged advice and correspondence considered by Messrs Eland and Hartnett when making the Order."

3. It is the second part of that clarification, given by email from Mr Monger to HMRC on 24 January 2014, that is material. It was that:

> "the expansion of the scope of 'authorised officer' to encompass absolutely anyone employed by [HMRC] [was] unlawful (on the grounds that its width is irrational and also contrary to the implicit restrictions imposed by section 100(1) itself."

4. The skeleton argument for Mr Barrett argues that the decision to apply the authorisation arrangements that were applicable to the penalties newly-introduced under Schedule 55 to the Finance Act 2009 to the established penalties under s 100(1), "appears to have been taken without any consideration as to its appropriateness". It is argued that it is *Wednesbury* unreasonable (or at least consequential on a failure to take into account relevant considerations) for the previous authorisation safeguards to have been jettisoned so readily.

5. The question is whether an argument of this nature – which goes to the reasonableness of the decision made by those responsible within HMRC for the making of the decision – constitutes a new ground of appeal or is in any event encompassed within the ground as set out in Mr Barrett's Response, and as clarified in the email of 24 January 2015.

6. In my judgment, looking at the terms of the ground as it was expressed and as it was clarified, the argument cannot be regarded as within that ground. It is necessary for each party's case to be expressed clearly in order that the other party can readily understand the scope of that party's case.

7. As it was originally expressed, the scope of the ground of appeal clearly required further clarification. This was evident to both parties and resulted in the email clarification, which not only sought to clarify the additional ground of appeal, but also the basis for the disclosure request.

8. It was in my judgment encumbent upon Mr Barrett at that stage, if not before, to have laid out his case explicitly. To the extent that the case was made on the basis of the behaviour of HMRC or individuals within HMRC being *Wednesbury* unreasonable, that argument should have been put forward in clear terms so that HMRC would have understood that that was Mr Barrett's case, or at least a part of Mr Barrett's case on Ground E.

9. As that was not done, Ground E as it was expressed cannot be read so as to encompass Mr Barrett's arguments concerning any failure on the part of HMRC (or Government generally) to consider the appropriateness of the decision embodied in the 2011 Board's Order.

10. I do not consider that the disclosure requests, whether those in these proceedings, or those made under the Freedom of Information Act, can affect this conclusion. Those requests could only do so if they had themselves been accompanied by a clear statement of the failure to consider the appropriateness of the decision. Instead, the clarification itself confined the arguments to those of irrationality and a construction of s 100(1). HMRC could not, in my judgment, have been expected to infer Mr Barrett's case from his disclosure requests. As with all modern pleadings, the approach is one of "cards face up on the table", which leaves no room for inference, or at any event the sort of inference that would be required in this case.

11. The conclusion that the argument in question is not encompassed within the existing Ground E means that it is necessary to consider whether it should be admitted as a new ground. I am clear that, as a matter of judicial discretion, it should not be admitted. It is too late, and there has been clear prejudice to HMRC in being unable to marshall the necessary evidence in relation to this ground. That evidence would require to be given by individuals who made the relevant decision, and there would need to be evidence of all the available information with a view to determining what was relevant and what was irrelevant in the context of a *Wednesbury*-type challenge.

12. Nor does the fact of the disclosure requests alter this conclusion either. Without the formulation of what I have decided was a new ground of appeal at an earlier stage, the requests for disclosure can do nothing to mitigate the prejudice to HMRC at this stage.

13. I am conscious that Mr Barrett is prejudiced by not being able to put forward this particular argument. That is unfortunate, but weighing the respective prejudices, and taking into account all the circumstances, I consider that it would not be in the interests of justice for Mr Barrett to be permitted to argue that the 2011 Order was adopted without any consideration as to its appropriateness.

14. On the other hand, Ground E as it has been expressed, and subject to what I have said in this decision, as it was clarified by the email of 24 January 2014, remains an arguable ground of appeal, including as to questions of jurisdiction. Whether the width of the 2011 Order is irrational or contrary to the implicit restrictions imposed by s 100(1) are, along with the jurisdictional point, questions on which the Tribunal will hear argument.

ROGER BERNER

TRIBUNAL JUDGE
RELEASE DATE: 7 July 2015