



**TC04526**

**Appeal number:TC/2013/00224**

*INCOME TAX – construction industry scheme – late filing of returns – penalties – proportionality of penalties – Commissioners for HM Revenue & Customs v Boshier applied – calculation of penalty – reasonable excuse – appeal allowed in part*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**BRIAN PARKINSON**

**Appellant**

**- and -**

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

**TRIBUNAL:    JUDGE JONATHAN CANNAN  
                    MISS SUSAN STOTT FCA CTA**

**Sitting in public in Manchester on 25 March 2015**

**Mr Frank Benson, Chartered Accountant appeared for the Appellant**

**Mr Ian Birtles of HM Revenue & Customs appeared for the Respondents**

## DECISION

### *Background*

1. Mr Brian Parkinson has been in business for many years as a gardener and landscaper. On 2 December 2011 HMRC commenced an enquiry into Mr Parkinson's self assessment return for tax year 2009-10. Mr Parkinson's accounts for the year ended 31 May 2009 contained an entry for construction industry costs of £8,758. It became apparent that this included payments to sub-contractors which fell within the Construction Industry Scheme (known as "the CIS").

2. Between June 2008 and April 2009 Mr Parkinson made 14 payments to sub-contractors. 5 of those payments, ranging between £40 and £3,500 and totalling £6,158, fell within the CIS. It did not occur to Mr Parkinson that the payments might fall within the CIS and therefore he did not make the necessary monthly returns.

3. Following the enquiry, HMRC issued penalty determinations totalling £31,500 due to Mr Parkinson's failure to make the necessary monthly returns. Mr Parkinson appeals against those penalty determinations. The grounds of appeal may be summarised as follows:

(1) Mr Parkinson has a reasonable excuse for failing to make the monthly returns.

(2) The penalty is disproportionate.

(3) The penalty has been incorrectly calculated.

4. We heard evidence from Mr Parkinson and from Mr Frank Benson who was his accountant at all material times and who appeared on behalf of Mr Parkinson.

### *The Construction Industry Scheme*

5. The CIS and penalties for non-compliance were considered in detail by the Upper Tribunal in *Commissioners for HM Revenue & Customs v Boshier* [2013] UKUT 0579 (TCC) at [2] – [15]. For present purposes we adopt the following description:

*" 2. The CIS is a tax compliance scheme for businesses operating in the construction industry. This is an industry that has traditionally attracted a large, itinerant workforce and often involves "cash in hand" transactions. Historically, this resulted in a significant loss of tax and national insurance contributions because many sub-contractors engaged in the construction industry "disappeared" without settling their tax liabilities, with a consequential loss of revenue to the Exchequer. The solution was described by Ferris J in Shaw (Inspector of Taxes) v Vicky Construction Ltd [2002] STC 1544 at [4]:*

*'In order to remedy this abuse, Parliament enacted legislation, which goes back to the early 1970s, under which a contractor is obliged, except*

*in the case of a sub-contractor who holds a relevant certificate, to deduct and pay over to the Revenue a proportion of all payments made to the sub-contractor in respect of the labour content of any sub-contract. The amount so deducted and paid over is, in due course, allowed as a credit against the sub contractor's liability to the Revenue.'*

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*3. The legal basis of the CIS, as it has been in force from 6 April 2007, is ss 57-77 of the Finance Act 2004 ("FA 2004") and the Income Tax (Construction Industry Scheme) Regulations 2005 (SI 2005/2045) (the "2005 Regulations"). As Ferris J said, the CIS requires certain payments by contractors to sub-contractors to be made subject to deduction of tax, but the sub-contractors are entitled to claim credit for tax withheld under CIS against their tax liability for the tax year in question.*

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*4. Contractors are required to make a return no later than 14 days after the end of every tax month (a "monthly return") (s 70 FA 2004 and reg 4 of the 2005 Regulations). For these purposes, a tax month means the period beginning with the 6th day of a calendar month and ending on the 5th day of the following month. So a monthly return must be received by HMRC no later than the 19th day of the month. Nil returns are also required (s 70 FA 2004 and reg 4(10) of the 2005 Regulations).*

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*5. If a monthly return is received after the filing date, it will be treated as late and the contractor will be liable to a penalty under s 98A of the Taxes Management Act 1970 ("TMA") (introduced by the Finance Act 1989 and amended relevantly by FA 2004), which provides:*

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

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

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

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

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*(i) ...*

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

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

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

5           6. *It can be seen that late filing penalties are chargeable for each month during which a return is outstanding after the filing date for a maximum of 12 months and a further penalty if the return has still not been filed after 12 months. There are two types of penalty:*

10                 1. *The monthly penalty of £100 for each month or part month that a return is late during the first 12 months when the employer has no more than 50 sub-contractors (as in Mr Boshers case); and*

15                 2. *A final late return (commonly referred to as the “month 13 penalty”) if the failure to submit a return continues after 12 months. The month 13 penalty may not exceed £3,000.*

*The total exposure to penalty for any one return is thus a maximum of £4,200.*

20           7. *As explained at [15] of the Decision, HMRC’s policy in calculating the appropriate month 13 penalty is to charge an increasing tariff based on the number of instances a return is over 12 months late in a rolling 12 month period. Thus the amounts levied in respect of the month 13 penalty for each failure in a 12 month period depend on the number of previous final penalties*  
25 *issued in that period. The tariff amounts are as follows:*

                                  1st failure - £300  
                                  2nd failure - £600  
                                  3rd failure - £900  
30                           4th failure - £1200  
                                  5th failure - £1500  
                                  6th and later failures - £3000

...

35           9. *Section 100B of TMA is headed “Appeals against penalty determinations” and sets out the relevant right of appeal and the extent of the Tribunal’s jurisdiction. It provides, so far as is material:*

40                 ‘(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.*

45                 (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 —

- 5 (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  
10 (iii) if the amount determined appears to be incorrect, increase or reduce it to the correct amount,

(b) in the case of any other penalty, the First-tier Tribunal may —

- 15 (i) if it appears that no penalty has been incurred, set the determination aside,  
(ii) if the amount determined appears to be appropriate, confirm the determination,  
(iii) if the amount determined appears to be excessive, reduce it to such other amount (including nil) as it considers appropriate, or  
20 (iv) if the amount determined appears to be insufficient, increase it to such amount not exceeding the permitted maximum as it considers appropriate.’

25 10. It can be seen, therefore, that where the amount of the fixed penalty of £100 appears to be incorrect, it may be increased or decreased to the correct amount. This contrasts with the position in relation to the month 13 penalty (the amount of which, it will be remembered, is not a fixed amount and so will be of an amount, not in excess of £3,000, determined by the authorised officer of the Board): where the amount of the penalty appears to be excessive or insufficient,  
30 the amount may be reduced or increased to an amount which the First-tier Tribunal considers appropriate. We note in passing that Parliament has clearly entrusted the decision on the amount of the month 13 penalty to the First-tier Tribunal in cases where that Tribunal considers the determination by HMRC to be excessive or insufficient.

35 11. Section 118(2) of TMA states that where a person had a reasonable excuse for not doing anything which was required to be done, he shall be deemed not to have failed to do it if he did it without reasonable delay after the excuse ceased. The subsection provides:

40 ‘(2) For the purposes of this Act, a person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the Board or the tribunal or officer concerned may have allowed; and where a person had a reasonable excuse for not doing anything  
45 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.'*

5       12. Under s 102 of TMA, HMRC has a specific power to mitigate penalties. The section provides:

10       *'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.'*

15       6. It is notable that the Regulations do not actually require a contractor to be registered as such, although a contractor is required by Regulation 4 to make monthly returns of payments.

20       7. Regulation 4(10) of the Regulations also requires a nil return to be made for the month following any month in which a return was required, unless the contractor has notified HMRC that he will make no further payments in the following 6 months.

25       8. The requirement to make a return of payments arises in respect of payments by contractors to sub-contractors relating to construction operations. For these purposes construction operations are defined widely by s74 FA 2004. There was no issue between the parties that the work done by sub-contractors engaged by Mr Parkinson amounted to construction operations for these purposes.

#### *Findings of Fact*

30       9. Mr Parkinson is 47 years old. He is a hard working family man who lives and works in Tarleton, west Lancashire. In June 1997 he commenced business as a self-employed gardener and landscaper. He generally works for local people, including private households and businesses with garden areas.

35       10. At first Mr Parkinson's only employee was his wife, who kept the books. In the year ended 31 May 1998 his turnover was some £16,600. By April 2005 his turnover had increased to a level which required him to be registered for VAT and he duly became registered. In the year ended 31 May 2008 his turnover was approximately £118,000 giving a taxable profit of £22,370. By that stage Mr Parkinson had several employees, both full time and part time, and he operated a PAYE scheme. Mr Benson has acted as Mr Parkinson's accountant since about 2000.

40       11. Since about 2002 Mr Parkinson has occasionally and to a small extent used sub-contractors to work on certain contracts. The need arises because his business is seasonal. Until June 2008 none of the work carried about by those sub-contractors fell within the meaning of construction operations for the CIS.

45       12. Mr Parkinson had little knowledge of the CIS. In or about 1999 or 2000 Mr Parkinson acted as a sub-contractor supplying labour only to his uncle who was then a building contractor. Mr Parkinson had to be registered for the purposes of the CIS as it then operated and was paid net after deduction of tax. That has been his only

experience of the CIS prior to the events we are concerned with in this appeal. He formed the impression, incorrectly, that the CIS applied to labour only sub-contractors. Since 2000 he has never received any literature from HMRC about the CIS.

5 13. Mr Benson regards Mr Parkinson as a model client operating self assessment, PAYE and VAT, making relevant returns and payments in an exemplary fashion. We have no reason to doubt that is the case.

10 14. In his accounts for the year ended 31 May 2009 Mr Parkinson incurred expenditure to 9 sub-contractors totalling £8,758. It is not disputed that the payments to 6 of those sub-contractors did not fall within the CIS. We are concerned in this appeal with payments to the following 3 sub-contractors:

<b>Sub-Contractor</b>	<b>Invoice Date</b>	<b>Invoice Amount £</b>	<b>Date of Payment</b>
John Webster	15 June 2008	190	30 June 2008
Mark Johnson	25 July 2008	1,875	17 Sept 2008
	23 Sept 2008	3,500	6 Nov 2008
R J Thompson	4 Mar 2009	40	7 Mar 2009
	11 April 2009	553	23 Apr 2009
<b>Total</b>		<b>£ 6,158</b>	

15 15. Mr Parkinson did not realise that the payments referred to above related to works which fell within the CIS. For the purposes of this appeal it is common ground that they did fall within the CIS.

20 16. In or about July 2008 Mr Parkinson was working at a hotel near Chester called Hoole Hall. The main contractor asked him if he could put up hoardings around the site, including a concrete pathway and a door. Mr Parkinson could not do it because he had enough gardening work on, but he knew Mr Johnson who was a joiner living in Tarleton. Rather than simply put Mr Johnson in touch with the contractor, Mr Parkinson agreed to do the job but sub-contracted Mr Johnson to do the work. Mr Johnson invoiced Mr Parkinson, and Mr Parkinson in turn invoiced the main contractor.  
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17. We did not have a copy of the invoice from Mr Parkinson to the main contractor. It is likely that Mr Parkinson added £100 or so to what Mr Johnson had invoiced. The reason he did so was to cover his costs in going to Chester because by that stage he was no longer working on the site. It never entered Mr Parkinson's

thoughts that the work amounted to construction operations for the purposes of the CIS.

18. In or about September 2008 Mr Parkinson entered into a similar arrangement with Mr Johnson for the same contractor. The work done by Mr Johnson was repair and maintenance to the part of the hotel building including repairs to doors, installing a door and fitting skirting boards. Again it is likely that Mr Parkinson added £100 to what he was charged by Mr Johnson.

19. In relation to the other payments, John Webster is Mr Parkinson's uncle. He is a retired builder and came to work at Hoole Hall. He supplied labour only doing a small amount of brickwork.

20. R J Thompson was engaged by Mr Parkinson to dig out and lay edging kerbs in the grounds of a private house in March 2009. In April 2009 he built a stone wall at the same property.

21. We are satisfied from the evidence of Mr Benson that little or no loss of tax has resulted from the failure of Mr Parkinson to deduct tax from the labour element of these payments. The amount of tax that Mr Parkinson ought to have deducted under the CIS was £837.90. However certainly Mr Johnson, who is a client of Mr Benson, accounted for tax on his income from Mr Parkinson without credit for the tax that ought to have been deducted.

22. Mr Parkinson did not consult either Mr Benson or HMRC with a view to clarifying the tax consequences of making the payments prior to making them. It simply did not occur to him that they might fall within the CIS.

23. Mr Benson prepared Mr Parkinson's 2009 accounts in or about November 2009. He can recall a discussion with Mr Parkinson at or about that time in relation to the CIS. However Mr Benson was satisfied that there was no loss of tax to HMRC. It was clear that the payments had been exceptional and would not be repeated. In the circumstances no late returns under the CIS were made at that time.

24. Shortly after HMRC opened their enquiry, Mr Parkinson submitted the monthly returns required by the CIS on 9 January 2012.

25. On 21 September 2012 the Respondents issued a penalty determination to Mr Parkinson for failing to file monthly contractor returns in the period 1 June 2008 to 31 May 2009. The total penalties charged were £31,500.

26. The figure of £31,500 was calculated by reference to the 5 payments identified above and on the basis that Mr Parkinson ought to have made a monthly return in relation to each of those 5 payments. There were fixed penalties of £100 under section 98A(2)(a) for each month during which the failure to make a return continued, up to a maximum of £1,200. In relation to each of the 5 returns the maximum penalty was payable giving a total of £6,000.

27. There was also a month 13 penalty under section 98A(2)(b) for the failure continuing beyond 12 months. The maximum penalty for each of those failures is set at £3,000. As recorded in *Bosher*, HMRC's policy is to charge an increasing penalty depending on the number of instances a return is over 12 months late in a rolling 12 month period. The penalty imposed under section 98A(2)(b) totalled £25,500.

28. The penalties were calculated by HMRC as follows:

<b>Return Due Date</b>		<b>Penalty S98A(2)(a) £</b>	<b>Penalty S98A(2)(b) £</b>
19 July 2008		1,200	300
19 Aug 2008		1,200	600
19 Sept 2008			900
19 Oct 2008		1,200	1,200
19 Nov 2008			1,500
19 Dec 2008			3,000
19 Jan 2009			3,000
19 Feb 2009			3,000
19 Mar 2009		1,200	3,000
19 Apr 2009			3,000
19 May 2009		1,200	3,000
19 June 2009			3,000
<b>Total:</b>		<b>£6,000</b>	<b>£25,500</b>

29. No penalties were issued for any period after the return due on 19 June 2009. It is not clear why that should have been the case, because regulation 4(10) requires a nil return unless the contractor notifies HMRC that he will not be making any payments to contractors in the next 6 months. Similarly no fixed penalties were issued for the nil returns falling due from 19 July 2008 onwards.

30. In a letter dated 20 March 2012 the Respondents implicitly recognised that the penalty being charged was "excessive". They stated that if Mr Parkinson agreed then they would reduce the penalty in accordance with section 102 TMA 1970 to bring it into line with the penalty regime under Schedule 55 FA 2009 which applied to defaults from October 2011 onwards. This practice was recognised and considered by the Upper Tribunal in *Bosher*. The penalty would then have been reduced to £3,083.78, but Mr Parkinson refused that offer.

31. Mr Birtles confirmed that if the penalty of £31,500 is confirmed in this appeal, HMRC will still mitigate that penalty so as to reduce it to £3,083.78.

5 32. Mr Parkinson was impressive and measured in the way in which he gave his evidence. He did not exaggerate and we are satisfied that he was an honest and credible witness. For example, he candidly accepted that he ought to have sought help at the time of the payments, and that he would do so in future. He described it as “*part of a learning curve*”.

10 33. When Mr Parkinson first received the penalty determination of £31,500 he described his initial reaction as one of shock. He did not know how he could possibly afford to pay such a penalty. Indeed he thought that he might just have to pack up the business. He would be in a position to pay a penalty of £3,000 but he felt that it was not right. He is proud of the business he has built up and the start in life he has given to his employees, many of whom go on to use their experience and get better jobs. He is proud to help local people, and all the sub contractors he uses are local people. In Mr Parkinson’s words “*the punishment does not fit the crime*”. We can well understand his frustration at what he sees as an unfair penalty.

15 *Reasons*

34. The grounds of appeal pursued by Mr Benson before us may be summarised as follows:

20 (1) Mr Parkinson took reasonable care to comply with the CIS, he acted in good faith and he has a reasonable excuse for the failure to make monthly returns.

(2) The penalty of £31,500 is not proportionate and is contrary to equity, fairness and the Human Rights Act 1998.

(3) The penalty has been incorrectly calculated.

25 35. Mr Benson accepted that Mr Parkinson failed to operate the CIS correctly. He submitted that the default arose because the payments made by Mr Parkinson were exceptional, and outside the ordinary course of his business. Mr Benson relied on the exceptional nature of the payments in support of his case that Mr Parkinson had a reasonable excuse for not operating the CIS correctly and making the necessary monthly returns.

35 36. Mr Birtles on the other hand relied on the exceptional nature of the payments as an indicator that Mr Parkinson had not taken reasonable care in operating the CIS. He submitted that a reasonable taxpayer would have specifically checked the tax consequences of an exceptional payment either with HMRC or with a tax adviser, in this case Mr Benson. The onus is on the taxpayer to take reasonable steps to identify the correct tax treatment of a transaction.

40 37. In relation to reasonable excuse we accept Mr Birtles’ submission that there is an obligation on traders to make themselves aware of tax law, or to obtain appropriate advice. In some respects the obligations on traders in relation to tax law and regulatory requirements are onerous. The relevant transactions were not in the

ordinary course of Mr Parkinson's business, but Mr Parkinson candidly accepted, albeit with the benefit of hindsight, that he ought to have discussed the treatment of these payments with Mr Benson.

5 38. In all the circumstances, but subject to one point which we deal with below, we are not satisfied that Mr Parkinson had a reasonable excuse for failing to lodge monthly returns.

39. In relation to the second ground of appeal, the proportionality of the penalty regime for non-compliance with the CIS has been considered in detail by the Upper Tribunal in *Bosher*. We are bound by that decision.

10 40. Neither party before us sought to distinguish the fixed penalties under section 98A(2)(a) and the month 13 penalties under section 98A(2)(b). It is clear from *Bosher* that we have no jurisdiction in relation to the amount of the fixed penalties imposed under section 98A(2)(a). We cannot reduce those penalties on the basis that we think them disproportionate or excessive. However we do have jurisdiction in relation to the  
15 amount of penalties under section 98A(2)(b). At [10] of *Bosher* the Upper Tribunal identifies that the decision on the right amount of the penalties under section 98A(2)(b) is entrusted to the First-tier Tribunal if it considers that HMRC's determination is excessive, or indeed insufficient.

20 41. The total penalties imposed of £31,500 are approximately one and a half times Mr Parkinson's annual profit for 2009. We can understand why some may consider such penalties to be disproportionate. Indeed, as we have noted, Parliament reduced the penalties considerably for defaults after 18 October 2011. However the Respondents have said that they will use their powers of mitigation to reduce the penalty to £3,083.

25 42. For the reasons set out in *Bosher* we cannot find that the fixed penalties totalling £6,000 are disproportionate. In particular the fixed penalties are subject to the reasonable excuse provisions and also subject to HMRC's power of mitigation in section 102 TMA 1970.

30 43. In relation to the penalties under s 98A(2)(b) it seems to us that HMRC have implicitly recognised that the total penalties charged under section 98A in this case are excessive. We agree. It seems to us that Mr Parkinson's culpability is extremely low on the scale. His error was completely inadvertent and related to unusual transactions outside the ordinary course of his business. He recognised that he ought to have consulted Mr Benson at the time of making the payments. That was the extent  
35 of his error. The trouble was he did not recognise the transactions as potentially having significant tax implications. We accept that there is an obligation on traders to make themselves aware of the law in the area in which they carry on business, including tax law. Taking all the circumstances into account it seems to us that Mr Parkinson's failure would be sufficiently penalised by the imposition of penalties  
40 under section 98A(2)(a). In the circumstances we shall reduce the penalties under section 98A(2)(b) to nil.

44. That is a significant reduction, although it might turn out to be academic given the mitigation HMRC have said that they will offer regardless of the result of this appeal.

45. There is also a separate point in relation to the quantum of the fixed penalties.  
5 The payment to R J Thompson on 7 March 2009 was £40. It related to the digging out and laying of edging kerbs in the grounds of a private residence. Strictly that amounts to construction operations and Mr Parkinson ought to have included the payment on a monthly return.

46. In reality it is a wholly insignificant amount. On its own however it has  
10 generated a penalty totalling £4,200. We have reduced the penalty of £3,000 under section 98A(2)(b) to nil. However it has still resulted in a penalty of £1,200 under section 98A(2)(a). For the reasons given in *Bosher* we cannot say that a fixed penalty is disproportionate. We do however consider that the amount of the payment which Mr Parkinson failed to return is insignificant. As such it falls within the de minimis  
15 principle. In Latin that principle is expressed as *de minimis non curat lex* – the law is not concerned with very small things. In relation to the monthly return due on 19 March 2009 we therefore consider that Mr Parkinson can be taken to have a reasonable excuse. We therefore reduce the penalties by a further £1,200.

47. We have not overlooked the fact that a nil return would still have been required.  
20 However HMRC have not imposed any fixed penalties in this case for failures to make nil returns.

48. Mr Benson alleged that the penalties had been incorrectly calculated. In particular, the date on which HMRC say that the monthly returns were due was calculated by reference to the date of the invoices to the various sub-contractors. It is  
25 clear however that monthly returns are required to contain details of payments made in the particular month, rather than sums invoiced which is how HMRC identified the due dates.

49. We are satisfied that HMRC did incorrectly use the date of invoice rather than the date of payment to sub-contractors. Mr Birtles was unable to help us with these  
30 matters because he was not aware of the details of the calculations, and to be fair Mr Benson had not raised them prior to the hearing. It seems to us that this error did not lead to any additional penalty. HMRC only charged the fixed penalties in relation to those returns which would have shown a payment. The month 13 penalties under section 98A(2)(b) were applied to all returns due, including nil returns, but we have  
35 reduced those penalties to nil. It must be a further source of frustration to Mr Parkinson that whilst he is expected to exercise reasonable care in his tax affairs, HMRC can fail to do so in their own calculation of the penalties.

### *Conclusion*

50. For the reasons given above we allow the appeal in part. The penalties under  
40 section 98A(2)(b) are reduced to nil. Further, Mr Parkinson had a reasonable excuse in relation to the penalty of £1,200 imposed in connection with the return due on 19

March 2009. We confirm that the total penalties due as a matter of law, before any mitigation under section 102 TMA, are £4,800.

51. HMRC have said that in any event they will mitigate the total penalty to reduce it to £3,083 in line with the penalty regime introduced in Schedule 55. Their power to mitigate under section 102 TMA is discretionary and at large. We do not have any jurisdiction, supervisory or otherwise, in relation to the exercise of that power. However we feel bound to say that taking into account all the facts it seems to us at least this is a case which would merit further mitigation.

52. We have found that there was a reasonable excuse for Mr Parkinson's failure to make a return of the payment of £40 to R J Thompson. That would reduce a penalty calculated under Schedule 55 by £300.60.

53. We note from HMRC's most recent booklet *CIS 340* that from 6 April 2015 as a matter of policy HMRC do not charge a penalty in respect of any month for which a return is not due because no payments were made to sub-contractors. We can do no more than express the hope that this policy can be applied retrospectively to the circumstances of Mr Parkinson in the same way as it appears to have been applied in relation to fixed penalties. That would reduce the mitigated penalty of £3,083.78 by a further £2,100. In our view, although not binding on HMRC, a total penalty of £683.18 would be a more appropriate penalty in the particular circumstances of this case.

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

**JONATHAN CANNAN  
TRIBUNAL JUDGE**

**RELEASE DATE: 14 JULY 2015**