[2016] UKFTT 0165 (TC)

TC 04955

Appeal number: TC/2014/05374

INCOME TAX– Construction Industry Scheme - failure to make returns where gross payments made–mistake by bookkeeper – whether reasonable excuse – special circumstances – proportionality – section 118(2) TMA 1970 – schedule 55 Finance Act 2009 – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

THOMPSON HEATING (2000) LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE GUY BRANNAN
MR DUNCAN MCBRIDE

Sitting in public at Fox Court, London on 16 February 2016

Mr Graham Evennett, Pickering Evennett Ltd, Accountants, for the Appellant

Ms Anne Rees, Presenting Officer, for the Respondents

DECISION

Introduction

1. Mr Ironside is a plumber. He owns Thompson Heating (2000) Ltd ("the appellant"). HMRC has imposed penalties on the appellant in respect of the rules relating to the Construction Industry Scheme ("CIS") contained in Part 3 of the Finance Act 2004 ("FA 2004") for failing to make returns of payments made to sub-contractors. No tax was due in respect of these payments because the sub-contractors were themselves registered under the CIS and were entitled to receive payments gross.

2. The appellant now appeals against these penalties on the basis that it had a reasonable excuse for its failure or, alternatively, that some of the penalties were disproportionate.

The Penalties

3. There are three penalty periods under appeal:

(1) Period 1: this period runs from 6 May 2007 to 5 March 2010. The penalties have been determined under section 98A Taxes Management Act 1970 ("TMA"). The penalty determination issued was in the amount of £34,200, although this figure has now been reduced to £11,700 for reasons explained below.

(2) Period 2: this period runs from 6 July 2011 to 5 September 2011. The penalties in this period have also been determined under section 98A TMA. The total amount of the penalties is £2,400.

(3) Period 3: this period runs from 6 October 2011 to 5 August 2013. The penalties for this period have been determined under Schedule 55 Finance Act 2009 ("FA 2009")[1]. The total amount of the penalties for this period is £3,700.

4. The penalties for Period 1 were reduced under HMRC's care and management powers from £34,200 to, initially, £13,800 and then to £11,700. The initial reduction to £13,800 was made on the basis that HMRC had decided to apply retrospectively the repeal of regulation 4(10) The Income Tax Act (Construction Industry Scheme) Regulations 2005 ("CIS Regulations"). This repeal had the effect that a contractor who had not made any payments under a construction contract was no longer required to submit a nil return to HMRC. It was this change that HMRC decided to apply

[1] A new penalty regime dealing with failure to deliver returns on time was enacted in Schedule 55 of the Finance Act 2009. However, pursuant to the rather prosaically named Finance (No 3) Act 2010, Schedule 10 and the Finance Act 2009, Schedule 55 and Sections 101 to 103 (Appointed Day, etc) (Construction Industry Scheme) Order 2011, the "old" penalty regime contained in s98A of TMA 1970 continues to apply in relation to failure to file returns under the Scheme that were due to be filed on or before 19 October 2011.

retrospectively to penalties issued in respect of nil returns that were due prior to 6 April 2015.

5. At the hearing, Ms Rees, who appeared for HMRC, informed us that the penalty figure for Period 1 had been further reduced to £11,700 to take account of time-barred periods.

6. It is also important to understand at this stage that the penalty figures stated above, at least as regards Periods 1 and 2, are stated before any mitigation of those penalties under section 102 TMA. In exercising its mitigation powers under section 102 TMA, HMRC has offered to mitigate the penalties for Period 1 down to a figure of £3,000 and for Period 2 the penalty will be mitigated down to £1,800.

7. The appeal is, however, against the unmitigated penalty amounts. At the hearing, Ms Rees confirmed that HMRC would continue to offer the same penalty mitigation even if the appeal was dismissed in accordance with HMRC's usual practice.

8. In accordance with the decision of the Upper Tribunal in *Bosher v HMRC* [2013] UKUT 0579 (TCC) this Tribunal can take account of HMRC's penalty mitigation policy in determining whether a penalty infringes an appellant's rights under the Human Rights Convention and as regards the proportionality of any penalties.

9. The penalties in respect of Period 3 have not, however, been the subject of mitigation because they have been determined under Schedule 55 FA 2009. As we understand it, HMRC considers that Schedule 55 has its own self-contained mitigation code (e.g. paragraph 15 "reductions for disclosure" and paragraph 16 "special reduction").

10. The above does not, however, tell the full story. The initial penalties for Period 1 were calculated at £135,000 because of the number of failures to submit nil returns and the period of time that such failures persisted. This staggering figure was eventually reduced, by HMRC applying the discretionary treatment referred to in their letter of 5 March 2014, to £3000. Perhaps understandably the correspondence reveals Mr Ironside's concern and anxiety about the scale of the penalties imposed on his company.

The facts

11. We find the following facts.

12. The appellant was incorporated in September 2000 and commenced trading on 1 May 2002.

13. For the periods in question the appellant retained the services of an independent bookkeeper, Mrs Murphy, to keep the appellant's books and deal with invoicing, "payments out", PAYE, VAT and CIS.

14. Ms Murphy did not appreciate that under the CIS Regulations (regulation 4 (10)) a contractor was obliged to submit a monthly return even if no payments were made in the month and, secondly, even if a payment was made to a sub-contractor who was registered for gross payment. In other words, in both cases it was required by law for the appellant to file monthly returns with HMRC even though no tax was payable. As we have noted, however, the penalties now being charged for failure to submit returns relate only to those months where payments were made to subcontractors.

15. In a note of a meeting on 27 June 2013 between Ms Murphy and Mr Elkington (the HMRC officer who investigated the appellant's penalty position), Mr Elkington records Ms Murphy as telling him that most of her time was spent administering a Community Association in Hornchurch, but in addition she dealt with the day-to-day accountancy for the appellant, including the invoicing and payments out, VAT, PAYE and CIS. The note stated:

> "She does it principally as a help to the Director's family, with whom she is closely acquainted. She said that she has been doing this work for six years or so. At year-end she prepares the accounting information for the company's accountants Pickering Evennett Limited."

16. Mr Evennett, who appeared for the appellant, said that Ms Murphy had been a friend of Mr Thompson's wife. Apparently Mr Thompson had previously been Mr Ironside's business partner but had retired from the company (apparently in 2009). Mr Evennett assured us that Ms Murphy was, however, a bookkeeper who was paid on a professional basis.

17. There was no other evidence at the hearing concerning the basis on which Mr Ironside retained Ms Murphy and whether he had satisfied himself as to her qualifications in relation to the various tax matters with which she dealt, including the CIS. Mr Ironside and Ms Murphy did not give evidence.

18. It is not necessary to relate the full correspondence between the appellant, Mr Evennett and HMRC relating to the dispute over the penalties. Suffice it to say, that the appellant appealed against the penalties and requested a review of the penalty decisions. On 2 September 2014, HMRC's review officer wrote to the appellant notifying it that the penalty decisions were being upheld in the sums stated in those penalty determinations. The letter concluded that the appellant did not have a reasonable excuse. The letter stated that:

> "It appears that the company have [sic] relied on the acquaintance of the director's family to carry out day-to-day book-keeping as a result of which periods of inactivity have been recorded when in fact returns were due; albeit nil returns. There is nothing to suggest that this matter would have come to light had it not been prompted by HMRC. Yes there is no tax lost however the legislation is tight in this regard and returns must be submitted whether tax is deducted or not.

> I have considered your agents' grounds of appeal but it contains nothing to suggest that the company has a reasonable excuse for the failure. He clearly states that the company maintained enough records to make accurate returns that [sic] aside however you have relied it appears on someone who was not fully au fait with the CIS guidance/legislation; careless on the part of the company in that regard and for not carrying out regular checks to ensure that they were fulfilling their obligations, something also missed by your agent.
>
> **Conclusion**
>
> I do not consider that there was a reasonable excuse for the failure, I have also given consideration to Special Reduction under Section 16, Schedule 55 but have seen nothing to warrant this either. I must therefore uphold the decisions in the sums as made."

19. In the course of the hearing, Ms Rees drew our attention to correspondence from HMRC (a letter dated 22 October 2013) which indicated that the various periods the appellant had claimed a period of "inactivity". This is a reference to regulation 4 (11) of the CIS Regulations. Regulation 4 (11) provided:

> "Paragraph (10) [the requirement to file monthly CIS returns] does not apply if the contractor has notified [HMRC] that the contractor will make no further payments under construction contracts within the following six months."

20. The periods of inactivity referred to in the 22 October 2013 letter were as follows:

> m/e 5/11/2007 to m/e 5/4/2008
>
> m/e 5/5/2008 to m/e 5/4/2009
>
> m/e 5/5/2009 to m/e 5/3 2010
>
> m/e 5/8/11 to m/e 5/9/2011
>
> m/e 5/11/2011 to m/e 5/4 2012
>
> m/e 5/7/2012 to m/e 5/8/2012
>
> m/e 5/6/2013 to m/e 5/8/2013

21. It will be noted that some of the periods were longer than six months, although it was not explained why this was so.

22. The review letter mentioned above, also referred to HMRC's records containing records of periods of inactivity having been notified. The letter also referred to the fact that payments had been made to sub-contractors during periods in which the appellant had been registered as being inactive.

23. There was no satisfactory explanation as to why the appellant (presumably through Miss Murphy) registered itself as inactive under paragraph 4(11) – which relieved it of the obligation to submit monthly returns, yet made payments to sub-contractors during these periods of inactivity and did not file the relevant monthly returns.

Validity of the penalties

24. There was no dispute that the returns required under the CIS Regulations had not been made on time. Similarly, there was no dispute that the returns should been made on time. Furthermore, disregarding for the moment questions of reasonable excuse and proportionality, there was no dispute that HMRC had correctly calculated the penalties in accordance with the legislation.

Reasonable excuse

25. As we have seen, the penalties in this appeal have been charged under two different statutory provisions. In Periods 1 and 2, the penalties were charged under section 98A TMA. Section 118(2) of TMA provides a defence of "reasonable excuse" where, inter alia, a penalty is imposed for failure to provide a particular return on time. Section 118(2) relevantly provides as follows:

> "…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."

26. Section 118 (2) does not, however, apply to the penalties charged under Schedule 55 FA 2009. In relation to those penalties, paragraph 23 Schedule 55 FA 2009 provides as follows:

> (1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a return if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.
>
> (2) For the purposes of sub-paragraph (1)—
>
> (a) an insufficiency of funds is not a reasonable excuse, unless attributable to events outside P's control,
>
> (b) 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, and
>
> (c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

27. Under section 118 (2) and paragraph 23 the burden of proof in establishing a reasonable excuse lies upon the appellant.

28. Two further points can be made about paragraph 23. First, paragraph 23 (2) (b) requires an appellant to show not merely that it relied upon a third party but also that it took reasonable care to avoid the failure. It seems to us that the second limb of this test requires an examination of whether the appellant's conduct in relying upon the third-party was reasonable. The implication of the second limb of the test is that mere reliance on a third party, without more, may not be a reasonable excuse.

29. Much will depend on the facts of each individual case, but this second limb may require enquiry into whether an appellant acted reasonably in appointing the third-party to carry out the duties in question (for example, whether an appellant satisfied itself that the third-party was competent to carry out those duties) and secondly whether an appellant acted reasonably in checking up that the third-party was performing his/her duties. In this connection, it may be the case that, for example, where the third-party is an experienced and ostensibly competent accountant the appointment of the third-party would be reasonable and the degree of checking required by an appellant would be limited. As we have said, however, what is reasonable will turn on the individual facts and circumstances of each case and it is simply not possible to lay down a rule of general application. Indeed, subject to the provisions of paragraph 23(2) in relation to Schedule 55 penalties, Parliament has left the question of what constitutes a reasonable excuse to the judgment of the Tribunal in the light of the circumstances of each case.

30. Secondly, as this Tribunal pointed out [152] in *Barrett v Revenue & Customs* [2015] UKFTT 329 (TC) (Judge Berner), paragraph 23 only applies to penalties determined under schedule 55 and it cannot be taken simply to have restated the earlier law (i.e. section 118 (2) TMA). Judge Berner continued by making the following helpful statements, with which we respectfully agree:

> "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."

31. In this case, Mr Evennett argued that a reasonable excuse existed for the purposes of both of section 118 (2) and paragraph 23 because the appellant relied on Ms Murphy, a bookkeeper who was remunerated on a professional basis.

32. We are not satisfied that this constitutes a reasonable excuse. It is for the appellant to show that its reliance on Ms Murphy was reasonable in all the circumstances in order for that reliance to constitute a reasonable excuse. In our view, the appellant has failed to discharge the burden of proof placed upon it under section 118 (2) and paragraph 23.

33. Mr Ironside did not attend the hearing and, as we have said, did not give evidence. We had no details, other than those set out above, of the basis on which Ms Murphy was appointed to make the CIS and other tax returns and in particular the qualifications and suitability for being entrusted with these responsibilities. There was no evidence to suggest that Mr Ironside, on behalf of the appellant, at any time consulted with Miss Murphy to ensure that its legal obligations were being discharged. We do not know why the appellant apparently notified HMRC of periods of inactivity even as regards some periods where payments were made to sub-contractors. It is particularly relevant in this context that the periods of default spanned a period of almost 5 years. In the event, Ms Murphy clearly did not understand the legal obligations to which the appellant was subjected under the CIS Regulations.

34. As regards, section 118 (2), in determining whether the appellant had a reasonable excuse it would, in our view, be necessary to form a view on whether it was reasonable for the appellant to have relied on Miss Murphy. This would, at least, require some understanding, as we have said, as to whether the appellant acted reasonably in appointing Ms Murphy in the light of her qualifications and experience. As we have said, there is insufficient evidence on this point put forward by the appellant.

35. In relation to paragraph 23 of Schedule 55, subparagraph (2) additionally requires, where it is alleged that the taxpayer relied on a third party, that it is shown that the taxpayer took reasonable care to avoid the failure. Again, for the reasons given in relation to section 118 (2), we consider that the appellant has not discharged the burden of proof in demonstrating that it took reasonable care to avoid the failure to submit the returns. We should add that there was no evidence that Mr Ironside discussed the monthly returns with Ms Murphy or took any steps to satisfy himself that all was in order. As far as we can ascertain, he appears to have handed the whole task of CIS compliance over to Ms Murphy and played little or no role in relation to it thereafter.

Proportionality

36. Mr Evennett argued that the penalties for Period 3 were disproportionate. He did not advance this argument in relation to Periods 1 or 2 because HMRC's power to mitigate penalties under section 102 TMA applied to the penalties charged in respect of those periods under section 98A TMA, but not to penalties charged under Schedule

55 FA 2009. In the light of the Upper Tribunal's decision in *Bosher v HMRC* [2013] UKUT 0579 (TCC) Mr Evennett did not seek to argue that the section 98A TMA penalties were disproportionate, although he argued that those penalties could be taken into account in assessing the proportionality of the penalties charged under Schedule 55.

37. The penalties charged under Schedule 55 FA 2009 were not subject to mitigation under section 102 TMA.

38. Mr Evennett argued that the penalty of £3,700 for Period 3 was disproportionate. HMRC has suffered no loss of tax and his client was, as Mr Evennett succinctly put it, being "penalised for not telling HMRC that it did not owe them any tax."

39. Moreover, the appellant had been charged penalties in Periods 1 and 2 in respect of what was essentially the same mistake i.e. a lack of awareness that payments which were correctly made gross to sub- contractors needed to be returned.

40. Mr Evennett also complained that HMRC had allowed the error to continue for almost 6 years without issuing £100 penalties on a timely basis. This was, he submitted, in breach of the Taxpayer's Charter to provide a helpful, efficient and effective service.

41. The Schedule 55 penalties represented approximately 75% of the profits (post-tax and dividends, the latter being effectively equivalent to Mr Ironside's remuneration) for the year ended 31 December 2014, the last reported year.

42. Mr Evennett based his argument on Article 1 Protocol 1 of the European Convention on Human Rights ("A1P1"). As the Upper Tribunal in *Bosher* commented at [28], an "interference A1P1 rights had to be justified and it can only be justified if it is proportionate."

43. According to Mr Evennett, the question was, therefore, whether the application of the penalty rules, as they applied to the particular circumstances of the appellant, was disproportionate. Mr Evennett did not seek to argue that the Schedule 55 regime as a whole was disproportionate.

44. In our view the penalty regime of Schedule 55, as far as relevant to this case, was not disproportionate. Schedule 55 contains various provisions which remove or permit a reduction in penalties. As we have seen, paragraph 23 allows for a penalty to be discharged on the grounds of reasonable excuse. Paragraph 16 allows HMRC to reduce a penalty because of "special circumstances" and paragraph 14 provides for reductions in a penalty in relation to prompted and unprompted disclosures. We consider that Mr Evennett was, therefore, correct when he did not seek to attempt to argue that the Schedule 55 regime as a whole was disproportionate.

45. We should also point out that, even though no tax may have been lost, the use of penalties to ensure the submission of nil returns may serve a legitimate policy objective of allowing HMRC to monitor compliance.

46. As regards the application of Schedule 55 to the particular circumstances of the appellant, we have concluded that this too was not disproportionate. It is true that HMRC did not lose tax, but Parliament intended that nil monthly returns should be made even in respect of gross payments to certified CIS sub-contractors. The Schedule 55 penalties reinforce this obligation.

47. The penalties under Schedule 55 were calculated as follows:

Tax month ended	**Date return due**	**Date return received**	**Penalty for return being one day late**	**Penalty for return being two months late**	**Penalty for return being six months late**	**Penalty for return being 12 months late**	**Total**
05/11/2011	19/11/2011	27/06/2013	£100	£200	£300	£300	£900
05/12/2011	19/12/2011	27/06/2013	£100	£200	£300	£300	£900
05/02/2012	19/02/2012	27/06/2013	£100	£200	£300	£300	£900
05/03/2012	19/03/2012	27/06/2013	£100	£200	£300	£300	£900
05/06/2013	19/06/2013	27/06/2013	£100				£100
Totals			£500	£800	£1200	£1200	£3700

48. The above calculation was not in dispute, save as regards proportionality and reasonable excuse.

49. As the above Table shows, the penalties increased in amount over time and were effectively capped at a maximum of £900 if a return was more than 12 months late (assuming no tax is lost and there is no deliberate withholding of information): see paragraphs 7 – 11 Schedule 55 FA 2009.

50. In Period 3, the default lasted over 20 months. We find it very hard to see how penalties of £3700 over such a period could be said to be disproportionate.

51. Mr Evennett, as we have said, compared the total amount of the penalties to the appellant's profits. For the year ended 31 December 2014 the appellant's profits on ordinary activities after taxation amounted to £19,905 and after dividends amounted to £4905. The corresponding figures for the year ended 31 December 2013 were £61,072 and £32,572, for the year ended 31 December 2012 the corresponding figures were £107,569 and £66,069. Although the figures for the most recent year 31 December 2014 show a decrease, this was not in fact the year in which the defaults

took place and taking the last three years together, we do not consider that penalties of £3700 were disproportionate.

52. Mr Evennett referred to *Laithwaite v HMRC* [2014] UKFTT 759 (TC) (Judge Porter). In that case, the FTT indicated that a penalty under section 98A of £21,600 might be disproportionate when compared with annual profits of between £17,000 and £25,000. The FTT also considered that a mitigated penalty of £7,200, representing over half the appellant's profits, might also be disproportionate. In that case the FTT had already decided that the appellant had a reasonable excuse under section 118 (2) TMA and the FTT's comments on proportionality were not necessary for its decision. Moreover, in the light of *Bosher* the FTT accepted that any concern over the size of the mitigated penalty would have to be addressed by way of judicial review.

53. We do not derive much assistance from comparing different FTT decisions (which in any event are not binding on us) on various penalty amounts and different profits. In our view, as we have said, a penalty of £3,700 representing repeated failures over a period in excess of 20 months does not seem to us to be excessive.

54. For our part, we believe that we should be wary about substituting our judgment as regards what is a fair penalty for that of Parliament. It seems to us that the question of how lenient or how harsh a penalty should be is primarily a question for Parliament rather than for this Tribunal. Parliament is better placed to weigh up the competing demands of ensuring that a penalty regime does not bear too heavily on an individual with the need to ensure compliance with the tax regime. It is no doubt for this reason that the courts have been reluctant to interfere with duly enacted statutory provisions (whether by way of primary or delegated legislation). For example, Green J summarised the position in *Gibraltar Betting & Gaming Association Ltd v Secretary of State for Culture, Media & Sport* [2014] EWHC 3236 (Admin):

> "All of the case law underscores the point that an Act of Parliament is at the apex of the exercise of the democratic decision making process. A court should only interfere with the [the Act in question] if there are fundamental errors or where the policy choices adopted are wholly unsupported by evidence or unconnected with any lawful policy objective and cannot on any logical or sensible basis be said to be consistent with the various limbs of the proportionality test."

55. Moreover, the Upper Tribunal in *HMRC v Total Technology (Engineering) Ltd* - [2013] STC 681 held at [93] that in order for a penalty to be disproportionate it had to be shown to be either 'devoid of reasonable foundation' (*Gasus Dosier Gasus Dosier- und Fördertechnik GmbH v Netherlands* (1995) 20 EHRR 403.) or 'not merely harsh but plainly unfair' *International Transport Roth GmbH v Secretary of State for the Home Dept* [2002] EWCA Civ 158 at [26], [2003] QB 728 at [26].

56. That is a very high threshold which has to be crossed in order to demonstrate that the penalties in this case are disproportionate. In our view, this threshold simply has not been reached in this case.

Special circumstances

57. The review letter of 2 September 2014 referred to the fact that the officer had considered whether there were special circumstances justifying a reduction in the penalty within the meaning of paragraph 16 (1) but said "but [I] have seen nothing to warrant this".

58. The provisions of Schedule 55 relating to "special circumstances" are as follows:

> 16 (1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.
>
> (2) In sub-paragraph (1) "special circumstances" does not include—
>
> (a) ability to pay, or
>
> (b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.
>
> (3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—
>
> (a) staying a penalty, and
>
> (b) agreeing a compromise in relation to proceedings for a penalty.
>
> ….
>
> 23(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 16—
>
> (a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or
>
> (b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 16 was flawed.
>
> (4) In sub-paragraph (3)(b) "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.

59. This Tribunal can, therefore, only vary the penalties in respect of Period 3 on the grounds of "special circumstances" if it concludes that HMRC's review decision was "flawed" in the judicial review sense.

60. Strictly, we consider that the decision was flawed because of the failure by the reviewing officer to give reasons for his decision (see *White v HMRC* [2012] UKFTT 364 (TC) (Judge Brannan) and *Bluu Solutions Ltd v Revenue & Customs* [2015] UKFTT 95 (TC) (Judge Redston)). However, it is clear that the officer had in mind and rejected the appellant's primary argument that by entrusting CIS compliance to Ms Murphy the appellant should either be excused penalties completely or that the penalties should be reduced in amount. We see no reason to interfere with the officer's decision.

Decision

61. As regards the complaint of a possible breach of the Taxpayers' Charter, the appellant's remedy would be to make a complaint with the Revenue Adjudicator.

62. For the reasons given above, this appeal is dismissed and the penalties are confirmed.

63. 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.

GUY BRANNAN
TRIBUNAL JUDGE

RELEASE DATE: 08 MARCH 2016