[2017] UKFTT 0335 (TC)

TC05812

Appeal number: TC/2016/06119

INCOME TAX – construction industry scheme – contractor failing to submit returns under the Income Tax (Construction Scheme) Regulations 2005 - penalties - whether the taxpayer had a reasonable excuse – no - whether there were special circumstances – no – whether penalties were disproportionate - no - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

BADEN CAUNTER **Appellant**

- and -

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL
MR DAVID EARLE

Sitting in public at Exeter on 28 March 2017

The Appellant in person

Miss Rhiannon Lewis, Officer of HM Revenue & Customs, for the Respondents

DECISION

Background

1. This case concerns the Construction Industry Scheme ("**CIS**"), and in particular the respondents (or "**HMRC**") decision that the appellant is to liable to penalties for failure to file returns during 2014 and 2015 in accordance with the relevant CIS regulations. These penalties amount to £3,250, and are set out in the appendix to this decision (the "**penalties**"). The appellant (or "**Mr Caunter**") has appealed against HMRC's decision on various grounds. Unfortunately for him we do not accept these; and so uphold the penalties, and dismiss the appeal.

Late appeal

2. This appeal was made approximately 2½ months late. Miss Lewis, on behalf of HMRC, made no objection to us hearing it, notwithstanding that it was out of time.

3. Given that there has been little prejudice to HMRC by the delay; there will be considerable prejudice to the appellant if we decided not to admit his appeal; and that there are tenable reasons for the delay, we decided to hear his appeal.

Evidence and findings of fact

4. The appellant gave oral evidence. A friend of his, Mr Richard Price, who knew about the appellant's business activities, also gave oral evidence on his behalf.

5. In addition to their evidence, we were provided with a substantial bundle of documents which included the grounds of appeal, correspondence between the parties, and details of the decisions made by HMRC in respect of the penalties.

6. We found both the appellant and Mr Price to be honest and credible witnesses and we accept their evidence.

7. On the basis of the evidence, we make the following findings of fact.

(1) Mr Caunter joined a building firm after he had left school and did an apprenticeship there. He worked at that firm for about 7 or 8 years, as an employee, being taxed under the PAYE system. The employer for whom he worked was someone who he held in high regard.

(2) He had heard about the CIS whilst working for this employer but had no detailed insight into how it worked.

(3) His employer had previously set himself up on his own, and because Mr Caunter held him in high regard, when an opportunity arose for Mr Caunter to do the same, and to do a job for himself, he took it. It was building a substantial extension to a residential property. This opportunity came up in October 2014,

and he became self-employed with effect from 6 October 2014, trading as a builder.

(4) He asked a friend's wife (Anna) if she could set him up as self-employed, which she did. She was responsible for obtaining a unique tax reference number, for him, from HMRC. She also told him when he had to pay tax (namely at the end of the year).

(5) He was aware of VAT being an issue, but had little insight into how it worked. All he knew was that it would be an advantage not to be VAT registered.

(6) When undertaking the extension project, he was paid by the customer, and he then paid two or three sub-contractors to whom he subbed out certain aspects of the work.

(7) He knew sufficient about the CIS to know that he had to deduct 20% from the payments he made to those sub-contractors (the "**CIS tax**"). However, although he knew he had to account for the CIS tax to HMRC, he was uncertain as to when he had to. He thought it might be when he completed his own end of year tax returns, and had to pay the CIS tax at the same time as he paid his personal tax. But he wasn't entirely sure. He did not seek to clarify this with either HMRC or with anyone else (including Anna). She had not made it clear when payments of the CIS tax needed to be made. Indeed she had not talked about the CIS to him at all.

(8) During the summer of 2015, the opportunity to tender for a substantial building project was identified to Mr Caunter. He tendered for it and having discussed the position with Mr Price (amongst others) was persuaded to see an accountant to take advice about the implications of that project when, a couple of months later in October 2015, it became apparent that Mr Caunter had been successful in his tender.

(9) He then approached Wills Accountants Ltd ("**Wills**") with whom he met on 14 October 2015.

(10) At that meeting Wills identified to Mr Caunter that the CIS was "an issue" since no relevant returns had been filed or tax paid to HMRC.

(11) Wills arranged to meet with Mr Caunter's bookkeeper, a gentleman from Dartmouth who Mr Caunter had engaged some months previously (but who had no knowledge of the CIS). The intention was to disclose to HMRC all details of the payments that had been made by Mr Caunter to his sub-contractors to that date.

(12) Wills also recommended that Mr Caunter trade as a limited company. A company called BC Building Services (South-West) Limited was incorporated on 10 December 2015, and Mr Caunter's sole trading business was transferred to that company on 31 December 2015. Mr Caunter is the sole director and shareholder of that company.

(13) Mr Caunter had been in touch with HMRC about the CIS in February 2016 but it was not until 21 March 2016 that the CIS returns for the period from

5 November 2014 to 5 January 2016 were filed with HMRC. The total CIS tax had been calculated at £5,231.55. It is our understanding that this tax has been paid.

(14) The company's business is growing. Although Mr Caunter does not believe that either he or the company has sufficient funds to pay the penalties, he confirmed that the company's customers are paying for the work that it is doing; it does not have cash flow problems; it does not have a problem because for example a customer has gone bust. Customers are paying their way.

(15) The reason why there was a considerable time delay between the accountants meeting Mr Caunter and identifying the CIS filing issues with him on 14 October 2015, and his contact with the respondents in February 2016 (and the subsequent filing of the relevant forms in March 2016), was because information that needed to be procured from Mr Caunter's bookkeeper was not forthcoming due to the failure by the bookkeeper to collate the information required in a timely manner.

(16) We believe that the fixed penalties were assessed and notified to the appellant on or around 8 March 2016, and the tax geared penalties, assessed and notified to the appellant on or around 12 April 2016. In any event, Wills, on 9 May 2016, wrote to the respondents referring to the "penalties recently imposed on them by you for late filing of various CIS returns".

(17) Following that letter, there was then correspondence between Wills and HMRC. Wills indicated, on behalf of the appellant, that it wished to appeal the decision. Following that HMRC, at Wills' request, carried out a formal statutory review, which resulted in a letter from the respondents to the appellant dated 25 August 2016, concluding that review and giving reasons as to why HMRC were not prepared to alter its original decision to levy the penalties.

(18) The appellant formally appealed against the penalties on the 26 October 2016.

The Law

Legislation

8. Since there is no dispute between the parties as to the applicable legislation relating to the imposition of the penalties, we set out a summary of it below, rather than extensive extracts.

Penalties

(1) A contractor who is within the CIS (as was the appellant) is obliged to complete returns in respect of a tax period and file them with HMRC. These returns must contain certain prescribed information (including identifying payments which have been made to sub-contractors in that period).

(2) A tax period starts on the 6th day of a month and ends on the 5th day of the following month.

(3) The returns must be submitted, and the CIS tax which has been deducted at source from payments to the sub-contractors paid to HMRC on the 19th day of that following month (the timing is slightly different if payment is made electronically, which was not the case for the appellant).

(4) Failure to file the return on time engages the penalty regime in Schedule 55 Finance Act 2009 (and references below to paragraphs are to paragraphs in that Schedule).

(5) Penalties are calculated on the following basis (paragraphs 8 -11):

(a) failure to file on time - £100.

(b) failure to file for two months - £200.

(c) failure to file for six months – 5% of payment due, or £300 (whichever is the greater).

(d) failure to file for twelve months – 5% of payment due or £300 (whichever is the greater).

(6) In certain circumstances the fixed £100/£200 penalties and the tax geared penalties are "capped". This means that:

(a) the total fixed penalties are limited to £3,000; and

(b) the tax geared penalties are just 5% even if that amount is less than £300 (paragraph 13).

(7) If HMRC considers a taxpayer is liable to a penalty, it must assess the penalty and notify it to the taxpayer (paragraph 18).

(8) A taxpayer can appeal against any decision of HMRC that a penalty is payable, and against any such decision as to the amount of the penalty (paragraph 20).

(9) On an appeal, this tribunal can either confirm HMRC's decision or substitute for it another decision that HMRC had the power to make (paragraph 22).

Special circumstances

(10) If HMRC think it is right to reduce a penalty because of special circumstances, they can do so. Special circumstances do not include (amongst other things) an ability to pay (paragraph 16).

(11) On an appeal to us under paragraph 20, we can either give effect to the same percentage reduction as HMRC have given for special circumstances or change the reduction. We can only change that reduction if we think HMRC's original percentage reduction was flawed in the judicial review sense (paragraph 22(3) and (4)).

Reasonable excuse

(12) A taxpayer is not liable to pay a penalty if he can satisfy HMRC, or this Tribunal (on appeal) that he has a reasonable excuse for the failure to make the return.

(13) However, an insufficiency of funds, or reliance on another, are statutorily prohibited from being a reasonable excuse.

Case law

Reasonable excuse

(14) The test we adopt in determining whether the appellant has a reasonable excuse is that set out in *the Clean Car Co Ltd v C&E Commissions* [1991] VATTR 234, in which Judge Medd QC said:

> "The test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?"

(15) Although the *Clean Car* case was a VAT case, it is generally accepted that the same principles apply to a claim of reasonable excuse in direct tax cases.

(16) Indeed, in the First-tier Tribunal case of *Nigel Barrett* [2015] UKFTT0329 (a case on late filing penalties under the CIS) Judge Berner said:

> "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."

(17) HMRC's Compliance Manual recognises that reasonable care cannot be identified without consideration of a particular person's abilities and circumstances, and HMRC recognises the wide range of abilities and circumstances of persons completing returns or claims.

> "So whilst each person has a responsibility to take reasonable care, what is necessary for each person to discharge that responsibility has to be viewed in the light of that person's abilities and circumstances".
>
> "In HMRC's view it is reasonable to expect a person who encounters a transaction or other event with which they are not familiar to take care to find out about the correct tax treatment or to seek appropriate advice".

Special Circumstances

(18) There have been a number of cases on special circumstances from which we derive the following principles (see *Bluu Solutions Ltd v Commissioners for Her Majesty's Revenue & Customs* [2015] UKFTT 0095 and the cases cited therein):

(a) While "special circumstances" are not defined, the courts accept that for circumstances to be special they must be "exceptional, abnormal or unusual" (*Crabtree v Hinchcliffe* [1971], 3 All ER 967) or "something out of the ordinary run of events" (*Clarks of Hove Ltd v Bakers Union* [1979], 1 All ER 152).

(b) HMRC's failure to consider special circumstances (or to have reached a flawed decision that special circumstances do not apply to a taxpayer) does not mean the decision to impose the penalty, in the first place, is flawed.

(c) Special circumstances do not have to be considered before the imposition of the penalty. HMRC can consider whether special circumstances apply at any time up to, and during, the hearing of the appeal before the tribunal.

(d) The tribunal may assess whether a special circumstances decision (if any) is flawed if it is considering an appeal against the amount of a penalty assessed on a taxpayer.

(e) The tribunal should assess any decision (or failure to make one) in light of the principles applicable to judicial review.

(f) Failure to have considered the exercise of its discretion to reduce a penalty by virtue of special circumstances, in the first place, or failure to give reasons as to why, (if HMRC has made a decision), special circumstances do not apply, can render the "decision" flawed.

(g) We can allow the taxpayer's appeal if we find that HMRC's decision is unreasonable unless it is inevitable that HMRC would have come to the same decision on the evidence before him (as per Lord Justice Neill in *John Dee Limited v Commissioners of Customs and Excise* 1995 STC 941).

> "I turn therefore to the second matter raised in the appeal, I can deal with this very shortly.
>
> It was conceded by Mr Engelhart, in my view rightly, that where it is shown that, had the additional material been taken into account, the decision would inevitably have been the same, a Tribunal can dismiss an appeal. In the present case, however, though in the final summary the Tribunal's decision was more emphatic, the crucial words in the Decision were:
>
> "I find that it is most likely that, if the Commissioners had had regard to paragraph (iii) of the conclusion to Mr Ross' report, their

concern for the protection of the revenue would probably have been fortified."

I cannot equate a finding "that it is most likely" with a finding of inevitability.

On this narrow ground I would dismiss the appeal."

(h) In deciding whether HMRC's decision was unreasonable, we should follow the approach summarised by Lord Greene MR in *Associated Provisional Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223:

"The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it."

(i) As Lady Hale has recently said, in *Braganza v BP Shipping* [2015] UKSC 17 at [24], this test has two limbs:

"The first limb focuses on the decision-making process - whether the right matters have been taken into account in reaching the decision. The second focusses upon its outcome – whether even though the right things have been taken into account, the result is so outrageous that no reasonable decision-maker could have reached it. The latter is often used as a shorthand for the Wednesbury principle, but without necessarily excluding the former."

(j) Having undertaken that assessment:

(i) if the tribunal considers the decision is flawed, it may itself consider whether there are special circumstances which could justify substituting it's decision for that of HMRC unless it considers that HMRC would inevitably have come to the same decision on the evidence before them.

(ii) if the tribunal considers that HMRC have properly exercised its discretion in relation to special circumstances, it cannot substitute its own decision for that of HMRC when considering by what amount, if any, it should reduce a penalty.

Proportionality

(19) In relation to the doctrine of proportionality and its application to the issues in this case, we have considered the following cases:

(a) *Paraskevas Louloudakis v Elliniko Dimosio* (Case C-262/99) [2001] ECR I-5547 ("*Louloudakis*")

(b) *International Transport Roth GmbH v Secretary of State for the Home Dept* [2003] QB 728 ("*Roth*")

(c) *James v UK* (Application 8793/79) (1986) 8 EHRR 123 ("*James*")

(d) *Wilson v SoS for Trade and Industry* [2003] UKHL 40 [2004] 1AC816 ("*Wilson*")

(e) *R(on the application of Lumsden and others) (Appellants) v Legal Services Board (Respondent)* [2015] UKSC 41 ("*Lumsden"*)

(20) From these cases we derive the following principles relating to proportionality:

(a) Proportionality as a general principle of EU law involves a consideration of two questions: first, whether the measure in question is suitable or appropriate to achieve the objective pursued; and secondly, whether the measure is necessary to achieve that objective, or whether it could be attained by a less onerous method (*Lumsden* at [33])

(b) As is the case for other principles of public law, the way in which the principle of proportionality is applied in EU law depends to a significant extent upon the context (*Lumsden* at [23].

(c) In the context of its application to penalties, the principle of proportionality is that:

(i) penalties may not go beyond what is strictly necessary for the objective pursued; and

(ii) a penalty must not be so disproportionate to the gravity of the infringement that it becomes an obstacle to the freedoms enshrined in the Treaty (*Louloudakis* at [67]).

(d) In deciding whether the measures or their application are appropriate and not disproportionate, the court must exercise a value judgment by reference to the circumstances prevailing when the issue is to be decided. It is the current effect and impact of the legislation which matters, not the position when the legislation was enacted or came into force (*Wilson* at [62]).

(e) The margin of appreciation given to law makers in implementing social and economic policy should be a wide one and the courts will respect the law makers judgment as to what is in the public interest unless that judgment is manifestly "without reasonable foundation" (*James* at [46]) or "not merely harsh but plainly unfair" (*Roth* at [26]).

Burden and standard of proof

9. The burden of establishing that the appellant is prima facie liable for penalties which have been properly notified and assessed lies with HMRC.

10. The burden of establishing that he should not be liable for such penalties because, amongst other reasons, he has a reasonable excuse, or that the penalties are disproportionate, lies with the appellant.

11. In each case the standard of proof is the balance of probabilities.

Discussion and conclusion

Notification of penalties

12. Under paragraph 18 of Schedule 55, it is a pre-requisite to the imposition of the penalties that HMRC must both assess and notify the appellant of the penalties, as well as stating, in that notice, the period in respect of which the penalties have been assessed.

13. We were not provided with copies of any of these notices which HMRC have visited on the appellant. But we have seen the electronic records suggesting that they were issued on 8 March 2016 (the fixed penalties) and 12 April 2016 (the tax geared penalties).

14. The appellant, who has been represented by Wills in relation to the penalties, (although not at the hearing) takes no point either that he has received no notices, or that these notices fail to contain the relevant statutory information.

15. Additionally, it is clear from Wills' letter of 9 May 2016 that the appellant had received notices of the penalties. Indeed it is against these that he is appealing.

16. We are therefore satisfied that proper statutory notices of liability to the penalties were issues to, and received by, the appellant.

Appellant's grounds of appeal

17. The appellant puts forward the following grounds of appeal:

(1) The penalties are disproportionate compared to the profits declared.

(2) HMRC have given him insufficient credit for coming forward and making full disclosure that he had failed to file the CIS returns.

(3) He was unaware that he had to make monthly returns.

(4) He wanted to keep costs down in the early period of his trading.

(5) He cannot afford to pay the penalties, and the business would be put in jeopardy if he had to pay them.

(6) HMRC should mitigate the penalties under their powers in Section 102 of the Taxes Management Act 1970 ("**TMA**").

Respondents reply

18. The respondents reply to these is that:

(1) The penalties are proportionate.

(2) Ignorance of the law is no defence. If the appellant was unaware of his obligations under the CIS, there is plenty of information available from HMRC to assist, and he could, and should, have contacted HMRC.

(3) Wills have admitted that he has no reasonable excuse.

(4) Under Schedule 55, ability to pay cannot be a special circumstance, and an insufficiency of funds cannot be a reasonable excuse.

(5) HMRC have no power to mitigate the penalties under Section 102 TMA since Section 103ZA TMA specifically prevents Section 102 TMA applying to penalties under Schedule 55.

Reasonable excuse

19. We remind ourselves that in order for there to be a reasonable excuse, the test is to decide what a reasonable taxpayer in the position of this appellant would have done in his circumstances and by reference to that test determine whether the conduct of the appellant can be regarded as conforming to that standard.

20. We also remind ourselves that, as submitted by Miss Lewis, that paragraph 23(2)(a) of Schedule 55 states that an insufficiency of funds is not a reasonable excuse, unless attributable to events outside the taxpayer's control.

21. In light of these principles, we do not believe that the appellant has a reasonable excuse for failing to submit the CIS monthly returns on time.

22. Miss Lewis suggested that Wills' admission that the appellant has no reasonable excuse prevents us from considering reasonable excuse. We do not believe that our jurisdiction to consider reasonable excuse, given to us by paragraph 23 of Schedule 55 can be ousted by what amounts to a barely informal admission, probably given without instructions, and which reflects Wills' view of their client’s position. So we have considered whether the appellant has a reasonable excuse.

23. It is clear that ignorance of the law, or a mistaken understanding of legislation is not accepted in law as an excuse for failure to comply with it. This is on the basis that a taxpayer should be sufficiently acquainted with the law and such knowledge is required to be accurate. We agree with Miss Lewis that there is a raft of information available to someone starting out in the construction industry, and that it would be reasonable to expect a taxpayer, in the appellant's position, to have reviewed such information and, if he was in any doubt as to its applicability to his circumstances, to have checked with HMRC, or with a specialist firm of advisers. It is clear from the

evidence that although not acquainted with the finer details of the CIS, the appellant had a general awareness of it when he started to trade on his own account.

24. We appreciate that he was endeavouring to keep costs down when he went out on his own, but insufficiency of funds, which is the basis for this submission (basically he could not afford to pay for proper specialist professional advice) is statutorily prohibited as being a reasonable excuse.

25. So, too, is the fact that he now says that he cannot afford to pay the penalties, and if he had to, it would jeopardise his business.

26. Finally, making timely and full disclosure is not a reasonable excuse for failing to submit the returns in the first place. It might be relevant to mitigation under Section 102 TMA, but this is unavailable to the appellant for reasons given below.

27. So it is our view that the appellant has no reasonable excuse for failing to submit the CIS monthly returns on time.

Special circumstances

28. In their review letter of the 25 August 2016, HMRC have addressed the possibility of reducing the penalties because of special circumstances, but concludes that having "carefully considered all of the information I hold..... do not think there are any special circumstances which allow me to reduce the penalties".

29. The letter then goes on to record the matters which the reviewing officer had taken into account when reaching that decision. So HMRC have, quite properly, considered whether special circumstances might apply to the appellant, but have concluded, having given reasons for that conclusion, why they do not apply in the appellant's circumstances.

30. Having considered those reasons, and the matters that HMRC have taken into account, it is our view that HMRC have come to a proper and lawful decision. It will be recalled that we can only disturb HMRC's decision on special circumstances if we believe it to be flawed in the judicial review sense. We do not think this is the case. Firstly, we, like HMRC, do not believe that the appellant's circumstances fall within the ambit of special circumstances. They are not exceptional, abnormal or unusual, or something out of the ordinary run of events. The appellant has simply failed to appreciate his responsibilities under the CIS, and consequently failed to comply with his statutory obligation to submit monthly returns. There is nothing exceptional about his position.

31. Secondly, the matters that HMRC have taken into account are relevant ones, and we cannot see that they have taken into account irrelevant ones. Finally we reiterate that ability to pay cannot be a special circumstance.

32. Accordingly we cannot disturb HMRC's decision that the appellant should be granted no reduction in his liability because of special circumstances

Proportionality

33. Wills, in correspondence, had suggested 2 cases which might be relevant to the issue of proportionality, and which the appellant might rely on. The first was *Enyses Holdings v HMRC* [2010] UKFTT 20 (TC); the second was *J&W Brown v HMRC* [2016] UKFTT 0343.

34. However, as Miss Lewis correctly pointed out, the principles set out in *Enersys* (the VAT case) have been, to a considerable extent, superceded by Upper Tribunal and Court of Appeal decisions relating to the default surcharge regime; and the case of *Brown*, concerned reduction for disclosure etc rather than proportionality.

35. HMRC rely on the case of *Bosher* (*HMRC v Anthony Bosher* [2013] UKUT 0579). This is a case concerning the CIS. We believe that it is relevant for two reasons.

36. Firstly, because the court decided that the CIS, generally, is a proportionate regime.

37. Secondly, in the circumstances of *Mr Bosher*, CIS penalties of £54,100, were held to be proportionate.

38. The doctrine of proportionality, as set out at [8(20)] above can be applied both to the CIS regime itself and its application to a particular taxpayer's circumstances.

39. It is clear from *Bosher* that the regime is not disproportionate. Even without the authority of an Upper Tribunal decision, we would have said the same. The penalties for late filing of CIS returns do not go beyond what is strictly necessary for the objective pursued. The objective is, of course, to ensure that HMRC have timely information as to whom, and in what amounts, a contractor has paid its subcontractors so that, as with any withholding tax regime, it can verify the position vis a vis each of those subcontractors.

40. As to its application of the doctrine to the appellant's circumstances in this appeal, it is our view that the penalties are very far from being "without reasonable foundation or not merely harsh but plainly unfair". We say this for a number of reasons.

(1) Firstly, in absolute terms, the penalty of £3,250 is not such a sum as to be plainly unfair.

(2) Secondly, in the light of Mr Bosher's situation (where a penalty of £54,100 was not seen to be disproportionate), the appellant's position in this case is far better.

(3) Finally, in relative terms, there is some dispute as to whether the figures suggested for the relevant comparison (profits of £4,693) for the appellant's tax period 5 April 2015, are indeed the correct basis for a comparison.

41. We appreciate that in this case HMRC have suffered no financial loss in that the CIS tax (of about £5,231.55) has been paid to HMRC.

42. But it is our view that this does not render the penalties disproportionate.

43. Finally, it is worth pointing out to the appellant that he has benefitted, considerably, from the capping regime mentioned at [8(6)] above. Without that regime, his liability to CIS penalties would have been considerably greater. It is another reason why, of course, the regime itself, and the application of it to the appellant's particular circumstances is proportionate.

Section 102 TMA

44. We agree with Miss Lewis that, notwithstanding what appears to be a misunderstanding in correspondence between HMRC and Wills, Section 102 TMA has no application to the appellant. Whilst Section 102 TMA ostensibly permits a statutory form of mitigation of 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"), Section 103ZA TMA, specifically directs that Sections 100-103 TMA do not apply to a penalty inter alia under Schedule 55 to the Finance Act 2009.

45. Unfortunately, both Wills and HMRC (in correspondence) have misunderstood this statutory provision, and have both thought that it can be used by HMRC to mitigate the appellant's penalties. As we say, this is not the case. It is something that Miss Lewis raised at the hearing; it is something with which we agree. We explained to the appellant that although HMRC have suggested in correspondence they could not consider Section 102 as a basis for mitigation unless and until the Tribunal had come to a decision, this does not accurately reflect the law. So that once we have come to our decision, it is not open to HMRC to undertake a further review under Section 102 TMA to consider mitigation, as they have previously suggested is the case.

Decision

46. For the foregoing reasons, we have decided that the penalties have been properly imposed, they are proportionate, there are no special circumstances which might reduce the appellant's liability to the penalties and he has no reasonable excuse for having failed to submit the relevant monthly CIS returns on time.

47. Accordingly, we dismiss his appeal.

Appeal rights

48. 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 a Company a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

RELEASE DATE: 19 APRIL 2017

Appendix

Period ended	Unique identification	Amount of penalty
5 November 2014	**100613229**	**£100**
5 November 2014	**100613238**	**£200**
5 November 2014	**100694078**	**£14**
5 November 2014	**100694086**	**£14**
5 December 2014	**100613247**	**£100**
5 December 2014	**100613256**	**£200**
5 December 2014	**100694093**	**£21**
5 December 2014	**100694101**	**£21**
5 January 2015	**100613264**	**£100**
5 January 2015	**100613273**	**£200**
5 January 2015	**100694109**	**£16**
5 January 2015	**100694114**	**£16**
5 February 2015	**100613281**	**£100**
5 February 2015	**100613290**	**£200**
5 February 2015	**100694123**	**£10**
5 February 2015	**100694133**	**£10**
5 March 2015	**100613300**	**£100**
5 March 2015	**100613310**	**£200**
5 March 2015	**100604139**	**£5**