[2017] UKFTT 0501 (TC)

TC05938

Appeal number: TC/2014/06259 & 04495

Income Tax – PAYE –failure to pay-Regulation 80 determinations – whether validly issued by reference to persons unknown —penalties – concealed and deliberate – held – Regulation 80 determinations not valid – categorical errors – appeal allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

Trowbridge Office Cleaning Services Limited **Appellant**

- and -

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

TRIBUNAL: JUDGE Rachel Short
William Silsby (Member)

Sitting in public at Eastgate House, Newport Road, Cardiff on 29 July 2015, 12 April 2016 and 16 November 2016

Mr Arthur of Martyn F Arthur Accountants for the Appellant

Mrs Glynis Millward for the Respondents

DECISION

1. This is an appeal against assessments for:

(i) Income tax due under determinations served under Regulation 80 of the Pay As You Earn Regulations for the years 2006 -7 to 2011-12;

(ii) Penalties in respect of the years 2008-9 to 2011-12 under Schedule 24 Finance Act 2007 for inaccuracies in returns; and

(iii) Penalties for years 2006-7 and 2007-8 under s 98A Taxes Management Act 1970 for failure to submit accurate P35 forms,

all in respect of 41 employees of the Appellant who were paid in cash during the relevant periods.

2. The two appeals were joined by a direction of 22 December 2014.

3. The determinations for each of the years in dispute were issued on 25 February 2014 and appeals were made on 5 March 2014. The total amount of tax assessed for all of the periods is £124,742.37. The total amount of penalty charged is £112,267.14 being 90% of the tax assessed. The penalties were issued on 28 March 2014 and 5 August 2014 and an appeal was made on 18 November 2014.

Preliminary matters

4. This appeal was first heard in Cardiff on 29 July 2015 but was adjourned part heard as a result of the Appellant's late application for witness evidence to be provided. The appeal was continued before the same Tribunal in Cardiff on 12 April 2016. The parties focused on different aspects of the appeal at the first and subsequent hearing. This decision sets out the case put by both parties in the two hearings separately to make this clear.

5. The Respondent applied for costs after the adjourned hearing on 29 July 2015 and it was agreed at the hearing on 12 April 2016 that this matter would be dealt with in written submissions. Written submissions were received from the parties on 10 and 23 May 2016. The Appellant also applied for a wasted costs order, but this was withdrawn on 1 June 2016.

Background facts

6. The Appellant provides cleaning services through a workforce of approximately 100 workers at any one time, which are provided to a number of different businesses including schools, offices and hospitals.

7. The Appellant has been in business since 1993 and Mr Belcher has been the director in charge of the business since about 2004. Mr Belcher is in charge of record keeping and paying wages to the Appellant's employees.

8. P35 Employer end of year returns for each of the years in dispute were returned by the Appellant showing approximately 100 employees.

9. The Appellant was selected for a compliance review in February 2012. At a meeting on 22 March 2012 HMRC established that P46 "Notice of New Employee" forms had not been kept for new employees. The Appellant kept "starter forms" but HMRC concluded that the information contained in those forms was inadequate; they included incorrect addresses, no employee names or incorrect names and no home address. HMRC identified 44 employees who were paid in cash and who had not been included on P35 returns for the 2010 -11 period.

10. HMRC informed the Appellant on 22 March 2012 that it would accept retrospective P46s for employees whose full correct details had not been provided. The Appellant has not provided these beyond the details included in the starter forms.

11. Most of the employees who were identified by HMRC as having been paid in cash left the Appellant's employment between March and April 2012. According to the Appellant this was because the Appellant informed them that it would no longer pay wages in cash.

12. HMRC issued Regulation 80 determinations for employees who were paid in cash for the periods 2006-7 to 2011-12 on 10 February 2014 based on actual pay figures obtained from the Appellant and its advisers on 5 December 2013 in response to requests from HMRC.

13. Penalty determinations for each of the years in dispute were issued on 28 March 2014 and in amended form on 5 August 2014.

14. The Appellant's representative requested a review of the determinations and the penalties on 2 May 2014.

15. HMRC undertook a statutory review and upheld their original decision, notified to the Appellant in a letter on 18 July 2014.

16. The Appellant appealed against the Regulation 80 determinations on 18 August 2014 and the amended form penalties on 18 November 2014.

Matters in dispute

17. As a result of the change in the focus of the parties' arguments between the first and second hearings, identifying the precise matters in dispute between the parties has not been straightforward. However, we have identified the fundamental questions are: (i) Has the Appellant complied with its obligations to follow PAYE procedures for cash payments made to employees of the Appellant between 2006 and 2012 particularly in completing accurate P35 Employer End of Year Returns for those periods (ii) Are the Regulation 80 determinations issued by HMRC for the 2008 – 9 to 2011-12 periods properly issued (iii) Are the Regulation 80 determinations for the 2006 -7 and 2007 -8 periods properly issued and (iv) Should the penalties which have been imposed on the Appellant for each of the periods be removed or reduced.

Agreed matters

18. The onus of proof is on the Appellant to demonstrate that the Regulation 80 determinations for the years 2006-7 to 2011-12 are incorrect.

19. The onus of proof is on HMRC to demonstrate that the determinations raised for the 2006-7 and 2007-8 tax years were to make good a loss of tax arising from the Appellant's carelessness.

20. The payments in question relate to individuals who were employed by the Appellant. A tax deduction for the cash amounts paid to these employees has been claimed and allowed as wages in the Appellant's corporation tax returns.

21. It is not disputed that any of the cash employees in respect of whom Regulation 80 determinations were issued were employees of the Appellant at the relevant time.

22. No tax has been accounted for and paid under PAYE for any of the employees who were paid in cash during the relevant periods.

23. No P46 "PAYE Notice of New Employee" forms have been provided for any of the cash paid employees for the years in question. Neither P14 forms, (year end employee summary) nor P38A forms (employer supplementary returns) have been completed for them.

24. The Appellant changed its processes in April 2011 and all new employees had a P46 completed. None of the cash paid employees covered by the Regulation 80 determinations started work for the Appellant after April 2011.

25. At the first hearing Mr Arthur on behalf of the Appellant accepted that the Appellant's record keeping was not perfect. At the second hearing Mr Arthur described the Appellant's book keeping as inadequate.

The law

26. The determinations against which this appeal is made were issued under the Income Tax (Pay As You Earn) Regulations 2003 – Regulation 80

> 80(1) *This regulation applies if it appears to the Inland Revenue that there may be tax payable for a tax year under regulation 68 by an employer which has neither been-*
>
> *(a) paid to the Inland Revenue, nor*
>
> *(b) certified by the Inland Revenue under Regulation 76, 78 or 79.*
>
> *(2) The Inland Revenue may determine the amount of that tax to the best of their judgment and serve notice of their determination on the employer.*
>
> *(3).....*

(4) A determination under this regulation may –

(a) cover the tax payable by the employer under regulation 68 for any one or more tax periods in a tax year, and

(b) extend to the whole of that tax, or to such part as is payable in respect of –

(i) a class or classes of employees specified in the notice of determination (without naming the individual employees), or

(ii) one or more named employees specified in the notice.

27. The assessments made by the Regulation 80 determinations for the two periods 2006-7 and 2007-8 were made outside the normal four year time limit for raising assessments on the basis that a loss of tax had been brought about by the Appellant's careless behaviour in accordance with s 36 Taxes Management Act 1970.

28. The Appellant argued that the determinations issued by HMRC were not valid because they omitted any reference to identified persons. S 114 Taxes Management Act is therefore potentially relevant to remedy any such omission. This states:

"*Want of form or errors not to invalidate assessments etc*

(1) S 114(1) An assessment or determination, warrant or other proceeding which purports to be made in pursuance of any provision of the Taxes Acts shall not be quashed, or deemed void or voidable for want of form, or be affected by reasons of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to be charged or affected thereby is designated therein according to common intent and understanding"

29. The penalties charged on the Appellant were raised under Schedule 24 Finance Act 2009 for the 2008-9 to 2011–12 periods and section 98A Taxes Management Act 1970 ("TMA 1970") for the 2006 -7 and 2007-8 periods.

30. Schedule 24 Finance Act 2007 – Penalties for Errors states that:

Liability for Penalty

Error in taxpayer's document

1 (1) A penalty is payable by a person (P) where –

(a) P gives HMRC a document of a kind listed in the Table below, and

(b) Conditions 1 and 2 are satisfied.

(2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to –

(a) an understatement of a liability to tax,

(b) a false or inflated statement of a loss, or

(c) a false or inflated claim to a repayment of tax.

(3) Condition 2 is that the inaccuracy was careless (within the meaning of paragraph 3) or deliberate on P's part.

31. The documents listed in the Table referred to include "*Income Tax – Return* for the purposes of the PAYE regulations". It is this return, the P35 Employer's end of year return, which HMRC say contained a careless or deliberate inaccuracy.

32. Paragraph 3 of Schedule 24 sets out the meaning of careless and deliberate for these purposes:

> 3(1) *For the purposes of a penalty under paragraph 1, inaccuracy in a document given by P to HMRC is-*
>
> *(a) "careless" if the inaccuracy is due to the failure by P to take reasonable care,*
>
> *(b) "deliberate but not concealed" if the inaccuracy is deliberate on P's part but P does not make arrangements to conceal it, and*
>
> *(c) "deliberate and concealed" if the inaccuracy is deliberate on P's part and P makes arrangements to conceal it (for example, by submitting false evidence in support of an inaccurate figure)..:*"

HMRC's position is that the inaccuracies in the Appellant's P35 returns were deliberate and concealed for all of the periods for which penalties were applied.

Evidence seen

33. We saw:

(1) The Regulation 80 determination Notices for each of the years 2006-7 to 2011-12. On all six of those determination Notices the column "name and national insurance number of employee" had been completed by HMRC with the statement "*Remuneration not previously accounted for on P35 returns*".

(2) Correspondence dated 28 March 2014 referring to Penalty Determination for 2006-7 and 2007-8 tax years and to Notice of penalty assessment for April 2008 to April 2012 tax years.

(3) Notice of Penalty Assessment issued on 28 March 2014 for the April 2008 to April 2012 periods and amended Notice of Penalty Assessment issued to the Appellant on 5 August 2014 for the same periods.

(4) Correspondence accompanying the Regulation 80 determinations;

(a) 25 February 2014 letter from HMRC to the Appellant simply stating "*I now enclose Income Tax determinations*"

(b) Letter from HMRC of 10 February 2014 to the Appellant referring to the intention to issue the determinations "*We will issue Income Tax determination in the amounts shown in computations sent to Abbey Tax Protection with a letter dated 11 December 2013. A copy of the computation summary is attached*"

(c) 11 December 2013 letter to Abbey Tax from HMRC including a schedule headed "*Computation of income tax on payments to "employees" whose identities have not been confirmed*" listing the six years in dispute, the total amount of pay and total amount of tax due for each year, not allocated on an employee by employee basis.

(5) Copy blank P46 forms relevant to the years in dispute.

(6) Examples of the Appellant's starter forms for a selection of the employees paid in cash.

(7) Note of meeting held between HMRC, the Appellant and the Appellant's advisers dated 22 March 2012.

(8) A list of the employees of the Appellant for whom no National Insurance number had been provided, compiled by HMRC after their meeting with the Appellant on 22 March 2012.

(9) Spreadsheet provided to HMRC on 7 August 2012 by Blomfields on behalf of the Appellant at HMRC's request, setting out the employees who were paid in cash and their leaving dates.

(10) Notes of a meeting of 17 August 2012 between the Appellant, its representatives and HMRC at which it was recorded "*We then mentioned the P46 problem and I emphasised that my colleague (Ed Saunders) was not making accusations that these people did not exist. It was a concern that to date it had not been proved that they existed"*.

(11) Abbey Tax schedules setting out details of employees who left in March and April 2012 and their replacement employees provided to HMRC on 14 March 2013.

(12) Abbey Tax schedules giving details of employees with no National Insurance numbers sent to HMRC on 5 December 2013 covering the periods 2006 -7 to 2011-12.

(13) HMRC letter to Abbey Tax of 11 December 2013 and schedule "Computation of income tax on payments to "employees" whose identities have not been confirmed".

(14) Notes of various telephone conversations between Mr Saunders and the Appellant's clients in August 2013 confirming that they had received cleaning services from the Appellant.

(15) Letters from 9 of the Appellant's clients dated June and July 2013 confirming that they had received cleaning services from the Appellant and identifying the individual cleaners provided.

(16) A summary of Mr Saunders' findings and a copy of his final report dated 11 December 2013.

(17) Various correspondence between HMRC, the Appellant and its advisers including HMRC's statutory review letter of 13 June 2014 stating " *As a result of extensive enquiries HMRC concluded that the company falsely claimed that it engaged 41 workers of which 39 the identity have not been verified"*.(sic)

Witness evidence – Mr Belcher

34. Mr Belcher gave oral evidence to the Tribunal and was cross-examined by Mrs Millward.

35. Mr Belcher told us that he had been running the Appellant's business for a number of years. The Appellant employs large numbers of part time cleaners. Mr Belcher estimated that the work force at any one time could be between 100 and 115 cleaners.

36. When a new cleaner started, Mr Belcher would ask them to complete a "starter form", which he considered to be the equivalent of a P46. Either he, his father or the employee's supervisor would get the form signed at the site where the employee was to be working.

37. When the forms had been completed, Mr Belcher would manually input the information into his payroll system and file the starter forms alphabetically. Mr Belcher said that he did not cross-check any of the information which was provided on the starter form, even for example to see if a new employee had actually worked for the Appellant previously. If a new employee could not provide a National Insurance number, he would record their date of birth instead. Employees could all understand, read and sign the forms which they were asked to sign by Mr Belcher.

38. Employees who were paid in cash were paid at their place of work.

39. Employees were on two weeks' notice and were paid fortnightly on what Mr Belcher described as an "am/pm" schedule; half of the workforce was paid one week, the other half the next.

40. It was common for employees who no longer wanted or were able to work for the Appellant to simply not turn up for work on a particular day.

41. Mrs Millward asked Mr Belcher a number of questions about discrepancies in the starter forms which the Appellant had provided at the meeting of 22 March 2012:

(1) Staff who worked in schools had to be CRB checked. In response to questions from Mrs Millward about employees at one particular school who did

not appear to be CRB checked Mr Belcher explained that they had relied on rules which allowed them to work with the oversight of employees who had been checked. Mr Belcher accepted that a number of those employed at schools had not provided a National Insurance number. This reflected statements made in a letter from Abbey Tax, the Appellant's adviser, to HMRC of 18 July 2013.

(2) On being taken to some example signed forms where signatures did not look consistent, Mr Belcher said that the forms were signed wherever the worker was, not in an office situation, sitting at a desk, which explained why the signatures were not always very good.

42. At the meeting on 22 March 2012, HMRC suggested that Mr Belcher was keeping the cash which he claimed was being paid to employees for himself. As a result of those comments, Mr Belcher decided that the Appellant would no longer make cash payments to any of its employees. He communicated this to employees himself or through the employees' supervisor. Most employees who had been paid cash left very soon after this change, only two stayed on. Replacements were found for those who had left quickly.

43. Mr Belcher said that he had not made any attempt to conceal anything from HMRC. The starter forms which he had provided to HMRC at the meeting of 22 March 2012 had not been "made up"; he had one for each employee. He was not aware of the need for any further identity checks which HMRC had suggested the company should have carried out. Until the large number of employees left in 2012, he believed that the Appellant's cash payments were being paid to existing individuals who had provided correct identities to the Appellant.

44. Mr Belcher explained that he had originally engaged Abbey Tax to advise the Appellant during HMRC's enquiries him but that he had stopped using them when they concluded that the matters were outside the terms of the company's original insurance protection.

Witness evidence – Mr Saunders

45. Mr Saunders told us that he had been employed by HMRC since 1981 and that his current role was an employer compliance officer.

46. Mr Saunders provided a witness statement dated 27 October 2015 which was taken as read. He gave oral evidence to the Tribunal and was cross-examined by Mr Arthur.

47. He told us that he had been asked to investigate the Appellant's PAYE affairs and that he had carried out checks on the starter forms provided by the Appellant, such as checking the addresses recorded against HMRC's own computer records and the register of electors. He had also visited some of the addresses. Those investigations had led him to believe that the names and details given on the starter forms were not accurate and that the persons named on the forms did not exist, or did not reside at the addresses which had been given. Mr Saunders said that he had not

been able to work out exactly what had been done but it had appeared to him from his investigations that the information given on the starter forms was contrived.

48. Mr Saunders gave two specific examples of what he considered to be concealment by the Appellant; the details given for Barbara Young, who seemed to be an individual who no longer worked for the Appellant and Mrs Vowles, who seemed to have had her identity hijacked by someone using her name as an employee for the Appellant.

49. Mr Saunders explained to us how he had calculated the penalties which had been charged on the Appellant by reference to his dealings with Mr Belcher. The only abatement which he had felt able to give was for Mr Belcher's co-operation in providing information, though even that had taken seven months to provide. It was not until this hearing that Mr Belcher had accepted that there were any failures in his record keeping and HMRC had had to go to great lengths in the attempt to identify the individuals to whom payment had been made. Mr Saunders accepted that he had received information about the individuals who had left en mass in March 2012 from Abbey Tax on behalf of the Appellant in December 2013. He confirmed that none of those covered in the Regulation 80 determinations were employees engaged after April 2011.

50. In response to questions from Mr Arthur, Mr Saunders said that in considering the appropriate penalties he had not made a distinction between the behaviour of the Appellant at the start and end of HMRC's investigations. He described the Appellant's actions as on a continuum. He did not accept Mr Arthur's suggestion that the Appellant's actions after the under-declaration had been discovered were not relevant to the penalty determination (either under the old or new penalty rules).

51. Mr Saunders gave his opinion that HMRC were able to issue a Regulation 80 Determination to a "class of persons unknown". The "class" for these purposes was the class of cash paid employees. Mr Saunders agreed that it would have been possible for HMRC to make the Regulation 80 determinations on a named basis by relying on the information provided by Abbey Tax in December 2013.

52. Finally Mr Saunders told us that while he considered that the Appellant's actions were tantamount to fraud, he had followed internal HMRC procedures and HMRC's fraud investigation team had not been prepared to pursue this case.

Appellant's arguments – first hearing

53. At the first hearing and in their appeal notice, the Appellant's main argument was that relevant information had been provided about the 41 employees, although not on a P46 form.

P46 information requirements

54. The Appellant's appeal notice of 18 August 2014 stated that: "*HMRC have inappropriately issued Regulation 80 determinations..... It would appear that the*

taxpayer has complied with the P46 requirements. He has simply not used an official form".

55. Mr Arthur accepted at the Tribunal that the Appellant's records were not perfect but said that the information which had been provided in the starter forms was in substance the equivalent to that required in a P46. There was nothing in the legislation which stipulated that this information had to be in a particular format, nor was there any obligation on the Appellant to check the information which it was given by its employees.

Existence of employees

56. Mr Arthur also raised a point which was not contained in the Appellant's appeal notice; that HMRC needed to clearly state whether or not they accepted that the employees paid in cash did actually exist.

Appellant's arguments – second hearing

Existence of the employees

57. At the second hearing the Appellant focused on HMRC's approach to the existence of the cash paid employees. Mr Arthur suggested that it was not open to HMRC to raise determinations under Regulation 80 on employees who they had previously alleged did not exist. HMRC had not demonstrated that the employees did exist. HMRC could not arbitrarily change its position and, for no apparent reason, now accept that the employees existed and issue Regulation 80 determinations in respect of them.

Validity of Regulation 80 determinations

58. The determinations issued under Regulation 80(4) by HMRC in respect of the 41 employees were not valid. The "*class of persons unknown*" to which the Regulation 80 determinations issued by HMRC referred was not a "class" of persons as envisaged by the legislation.

59. On behalf of the Appellant Mr Arthur declined to give further detailed comments on the interpretation of Regulation 80(4) merely stating that this was a question of interpretation for the Tribunal.

S114 Taxes Management Act 1970

60. In considering whether s 114 TMA 1970 might be applicable to remedy any deficiencies in the determinations, Mr Arthur simply re-stated the Appellant's position that the determinations were flawed because a "class of persons" for these purposes cannot include individuals who do not exist saying *" s 114 TMA 1970 makes provision for treatment in relation to persons or property charged, there are no more persons identifiably involved in this matter than there were persons identifiable on the Marie Celeste"*.

Penalties

61. Mr Arthur argued that while it was accepted that the Appellant had been careless in its record keeping, nothing had been deliberately concealed from HMRC.

62. The Appellant, acting through its director Mr Belcher, believed that the information which had been provided about the identities of the employees on the starter forms was genuine. It was only when a large number of employees left when the Appellant announced that it was no longer making cash payments (in March 2012) that any suspicions were aroused.

63. If, as HMRC now accept, the cash paid employees existed, there was no evidence that the Appellant has taken any actions to deliberately conceal their existence or their identities.

64. Mr Arthur accepted that Mr Belcher had not been good at keeping paperwork and that he had been "cavalier" in his attitude to record keeping, but stressed that while his paperwork might have been inadequate, nothing had been falsified and there was no question of any fraudulent activities.

HMRC's arguments – first hearing

65. Mrs Millward said that the onus of proof was on the Appellant to demonstrate that the Regulation 80 determinations had not been properly issued but accepted that the onus was on HMRC to show that the penalties had been properly levied

Information requirements

66. At this hearing Mrs Millward focused on the information which was legally required from an employer about its employees. She referred to s 113 Taxes Management Act 1970 and to the PAYE Regulations (Regulation 46 – 49) and provided a blank P46 form to illustrate what information was required and to suggest that it was the Appellant's obligation to check the signed and completed P46 forms, which this Appellant had not done.

67. Even if the Appellant did not provide a P46, as an employer it was still obliged to keep full details under Regulation 66 of the PAYE Regulations, "*Deductions working sheets*", which provides a list of the information which an employer is obliged to record about an employee to whom a payment is made, including name, address, amounts paid and if no National Insurance number was provided, the employee's date of birth. Under Regulation 49, an employer was obliged to send HMRC completed P46 forms, prepare deduction working sheets and deduct tax on a cumulative basis. The Appellant had not complied with these procedures.

Existence of the employees

68. Concerning the existence or otherwise of the employees, Mrs Millward explained that HMRC's initial position had been that there were three possible explanations for the discrepancies in the starter forms provided by the Appellant;

payments were being diverted from non-existent employees to the directors of the Appellant; payments were being diverted from non-existent employees to top up the pay of other employees; payments were being made to "ghost employees", or a combination of all three.

69. In response to Mr Arthur's questions Mrs Millward stated that HMRC accepted that all of the employees referred to in the starter forms existed but that all or most had left in March and April 2012, as Mr Belcher had said.

HMRC's arguments – second hearing

Existence of employees

70. At the second hearing Mrs Millward clarified, contrary to what Mr Arthur had seemed to suggest, that it was no longer any part of HMRC's case that the cash paid employees did not exist. HMRC accepted that they existed because Mr Belcher accepted that they did and because they had carried out work on behalf of the Appellant.

Validity of Regulation 80 determinations

71. The Regulation 80 determinations were validly issued because the Appellant had not complied with its PAYE obligations. Inadequate information about the cash paid employees had been provided to HMRC for the relevant years and HMRC believed that an amount of tax had been underpaid.

72. Mrs Millward described Mr Belcher's record keeping as woefully inadequate and described the difficulties which HMRC had encountered in trying to identify the 41 employees in HMRC's own records. She stressed however that it was not her case that just because an employee could not be traced in HMRC's systems, they did not exist.

73. Mrs Millward gave some examples of what she considered to be the Appellant's poor record keeping. A Barbara Young had completed one of Mr Belcher's starter forms and given a date of birth which meant that she was 64 at the time when she was employed. That meant that she was eligible for a state pension, but no reference was made to this on her starter form. In other cases, starter forms contained addresses which did not exist, incorrect names and/ or no National Insurance number.

74. The Appellant's failure to provide accurate information about its employees meant that those employees could not be taxed correctly and may be denied benefits which they were otherwise due.

75. Mrs Millward said that the re-write of the PAYE Regulations in 2003 made clear that while an employee is liable for their own tax bill, it is the employer's obligation to make the payment under PAYE.

Class of persons unknown

76. Mrs Millward explained that in her view it was legitimate to apply a Regulation 80(4) determination to a "*class of persons unknown*".

77. In response to the Tribunal's directions to consider the interpretation of Regulation 80(4) in circumstances where HMRC are issuing a determination "extending to the whole of the tax for that period", HMRC suggested that it was still a requirement to stipulate a specific class of employees to which the determination applied. In their view, if the draftsman of Regulation 80 had intended otherwise, the second part of Regulation 80(4)(b) would have been drafted as a new sub-paragraph (c).

78. HMRC explained that in their view the rule in Regulation 80(4)(b) is intended to apply in situations where HMRC do not know the names of the employees who have not paid sufficient tax, and is the relevant part of the Regulation in this case. The rule allows HMRC to describe employees without naming them individually or knowing who they are. In circumstances in which there is real doubt or difficulty in establishing the identity of employees, HMRC should not be expected to produce anything other than a generic description for the purposes of Regulation 80, which is issued on a best of judgment basis.

S114 TMA

79. As to whether s 114 TMA might be available to HMRC to overcome any errors or omissions in the determinations, Mrs Millward gave her view by reference to the tribunal decision in *Backhouse*, that if there were any deficiencies in the determinations, s 114 could be relied upon to remedy this. (*Backhouse v HMRC* [2012] UKFTT 247 TC). She said that as in *Backhouse*, the Appellant had not been misled about why the determinations were issued and any errors were not so serious as to invalidate them. Mrs Millward suggested that a small change in the terms of the determinations (to refer to "*remuneration paid to cash recipients not previously accounted for*") would remove any confusion and this was a trivial change.

Penalties

80. Mrs Millward explained how the level of penalties had been calculated by HMRC for each of the years in dispute, pointing out that it was only at the time of the second hearing that Mr Belcher had accepted that he had been careless in his record keeping for the Appellant. It had taken the Appellant seven months to provide information which had been requested by HMRC.

81. The Appellant's actions were deliberate in HMRC's view because Mr Belcher knew that the information which he had provided was inaccurate. He had received the P35 check list and should have been aware of the need to complete an "Employer Supplementary Return", which was not done until 2011-12.

82. The Appellant's actions were concealed because the names of past employees had been used and information had been hidden about the cash payments. Money had been used to pay wages in cash and tax had not been deducted. In their letter to the Appellant's advisers of 8 January 2013 HMRC explained:

"*A deliberate and concealed inaccuracy is the most serious level of evasion. It occurs where a document containing a deliberate inaccuracy is given to HMRC and active steps have been taken to hide the inaccuracy either before or after the document has been sent to us..... As well as deliberately recording an inaccuracy, the person has to take active steps to conceal the inaccuracy"*.

83. In respect of the earlier periods, Mrs Millward's said that in HMRC's view the Appellant had been negligent because accurate information had not been provided for those earlier periods. Mrs Millward could not confirm that HMRC had notified the Appellant that it intended to make assessments outside the normal time period for these periods or the basis on which those assessments would be made.

Decision

Findings of fact

84. Each of the individuals who had received payment from the Appellant existed, even if their correct legal identity was not clear, and had carried out work for the Appellant.

85. P35 Employer End of Year Returns had been made by the Appellant for each of the periods in dispute including the statement that "*forms P14 end of year summary for each employee or director for whom I was required to complete a form P11 Deductions working sheet (or equivalent record) during the year are all enclosed"*

86. The P35 Employer End of Year Returns did not contain any information about the employees who were paid in cash for each of the relevant periods.

87. The Appellant had obtained information from each of the cash paid employees which had been recorded on the Appellant's "starter forms". Those were not in the same format as a P46 and did not consistently record all of the information required on a P46 form.

88. The Appellant had claimed a corporation tax deduction for sums paid to each of the cash paid employees in the relevant years.

89. The Regulation 80 determination Notices issued by HMRC did not refer to any employees of the Appellant or to any class of employees, but to "*remuneration not previously accounted for*".

Existence or otherwise of the employees

90. Considering the existence of those in relation to whom a tax charge has been made is a rather unusual place to start an appeal decision. The Appellant attempted to persuade us that uncertainty in the mind of HMRC over the existence of the cash paid employees invalidated the Regulation 80 determinations which had been made.

91. We do not consider that this approach has merit. HMRC accepted at the first hearing, in their written response to the Tribunal's Directions of 29 July 2015 and

reiterated at the second hearing, that they accepted that 41 cash paid employees did exist. Therefore we do not consider that HMRC can be taken to task for "arbitrarily" deciding that the 41 employees existed just so that Regulation 80 determinations could be made.

92. Our view is that a distinction needs to be made between existence and legal identity. As HMRC pointed out, individuals had certainly carried out work for the Appellant, had been paid by the Appellant and a corporation tax deduction had been given for those payments. Mr Saunders' investigations and the letters from clients provided by the Appellant's clients all support the fact that cleaning work was carried out by certain individuals on behalf of the Appellant.

93. The issue is not whether those individuals existed, but what their correct legal identities were. On the basis of the evidence provided by Mr Saunders we accept that the information given in the starter forms was not always complete and was often inaccurate, however there was nothing in the evidence which we saw which suggested that any of these employees were "phantom" employees, even if some of their personal details might not have been accurate.

Compliance with PAYE obligations

94. Although the Appellant's arguments concentrated on the equivalence of the "starter forms" to a P46 new employee form, whether or not the starter forms included all of the information required of a P46 is not sufficient to protect the Appellant against the Regulation 80 determinations which arose as a result of the Appellant failing to report information on the 41 cash paid employees as part of its P35 Employer's End of Year Return, or to account for tax in respect of the remuneration paid to those employees.

95. Assuming that each of these employees existed, we cannot see any basis on which the Appellant can suggest that it had complied with these procedures. Even if the starter forms could be treated as equivalent to a P46, those forms had not been sent to HMRC and tax had not been deducted by reference to the correct, or any, code for these employees as required by the PAYE Regulations, in particular Regulation 49.

96. In the face of this lack of information, HMRC believed that the correct amount of tax had not been paid in respect of these employees, therefore HMRC could properly make a determination under Regulation 80.

Validity of the Regulation 80 determinations – the class issue.

97. That leads us to the Appellant's second argument; if the 41 employees existed, can a Regulation 80 determination properly be made in respect of them as a "class of persons unknown". The Appellant argued that "persons unknown" was not a "class of persons" as that term was intended to be used in Regulation 80. HMRC accepted that they could have issued the determinations on an individual by individual basis by referring to the list of employees provided by Abbey Tax in December 2013, but had not done so.

98. The Regulations provide some latitude for HMRC to identify employees by a class without naming individual employees, but make clear that if the determination is made on a "class" basis, that class must be "*specified in the determination*". This is supported by the format of the Regulation 80 determination Notice used by HMRC which starts with a column headed "name and national insurance number of employee".

99. HMRC gave some examples of other situations in which the "class" approach might be used and we can understand that it might more readily be applied to groups of employees who have a common role or are at a common location. However, we can see no reason in principle or in practice why this group of employees cannot be treated as a "class" for this purpose as long as they can be properly identified.

Interpretation of Regulation 80(4)

100. Regulation 80 allows HMRC to issue a determination, which operates as an assessment to tax, if they believe that tax should have been paid under the PAYE Regulations which has not been paid. Any determination is to be made to the best of HMRC's judgment (Regulation 80(2)). In accordance with Regulation 80(4)(b) the determination can cover the whole of the tax due for the period, or, only part of the tax payable for that period.

101. HMRC stated that these determinations had been issued for the whole of the tax due for the period under Regulation 80(4)(b). HMRC told us that it was their view that it was necessary to identify a class of employees even if the tax due was "the whole of the tax for the period", but that this could be limited to the identification of a general class.

102. In fact, counter to HMRC's position, our view is that the "tax due" referred to in Regulation 80(4)(b) is a reference to any PAYE due for that period under Regulation 68. We know that the Appellant had paid some of its PAYE for the relevant periods (in respect of the non-cash paid employees). The tax due for these purposes is therefore not the whole, but part of the tax due.

103. For that reason we have approached this question on the basis that it is necessary to identify a class of employees for these purposes and considered whether HMRC did in fact provide sufficient information to identify a class of employees for these purposes.

Identification of class of employees

104. Mr Arthur said, and we agree with him on this, that if even one of the employees in the "class" referred to did not exist, then the whole of that determination would fail. However, the Appellant did not seek to demonstrate that any of the employees covered by the determinations did not exist.

105. Our view is that the Appellant's resistance to this formulation of the Regulation 80 determinations is a sub-set of its arguments about HMRC's approach to whether the 41 employees did or did not exist. If, as we have accepted, they did exist, the

Appellant did not point to any specific reason in the PAYE Regulations why a group of employees whose specific legal identity is not known but can otherwise be identified cannot be a class for these purposes.

106. In fact, contrary to the description of the determinations given by the Appellant, all of the six determination Notices which we saw made no mention of employees at all, whether as a class or individuals, but merely referred to "*remuneration not previously accounted for*". By reference to Regulation 80(4)(b)(i) there is no "class or classes of employees specified". By deduction it might be possible to say that the remuneration must relate to a class of employees, but no such class is specified on the face of the determinations themselves.

107. The only way of deducing the class of employees for whom remuneration has not been accounted for and who are the subject of these determinations is to take account of related correspondence between the parties. We have considered whether in interpreting these determinations it is possible to take account of accompanying correspondence from HMRC which might allow a class of employees to be identified. In fact, the correspondence which accompanied the determinations provides no such help; the accompanying letter from HMRC of 25 February 2014 merely states "I now enclose the Income Tax determinations". It is necessary to go to the previous HMRC letter of 10 February 2014 to obtain any information about any group of employees to which these determinations might attach.

108. HMRC's letter of 10 February 2014 states "we will issue Income Tax determinations in those amounts shown in computations sent to Abbey Tax Protection with a letter dated 11 December 2013. A copy of the computation summary is attached. The total tax payable is £124,742.37". The schedule accompanying HMRC's letter of 11 December 2013 was headed "*Computation of income tax on payments to "employees" whose identities have not been identified*". It set out a summary of amounts paid and tax due for each of the years for which determinations have been issued. The total amount of pay included in the schedule for each of the six years was exactly the amount shown in the detailed schedules provided to HMRC by Abbey Tax but HMRC's letter of 11 December 2013 made no direct reference to the Abbey Tax schedules. It simply stated "I have prepared computations of the tax payable". The schedule heading "*Computation of income tax on payments to "employees" whose identities have not been identified*" is the only reference to anything which might be treated as a class of employees for these purposes, being the class of unidentified employees for each year.

109. The adoption in the six Regulation 80 determinations of the precise amounts shown in the schedules provided by Abbey Tax as having been paid to the cash employees in each of the relevant years provides a strong indication that the determinations did relate to "payments" to "employees" whose identities have not been identified, but we have to consider whether without any specific reference to these employees on the face of the determinations, they are valid.

110. In some circumstances it might be possible to read into a document related correspondence in order to properly interpret its terms. We have some doubts

whether this can be done here both because of the very specific wording of Regulation 80(4)(b)(i) and the rather convoluted trail of correspondence which leads to the identification of the "class of employees" to which the determination applies.

111. HMRC might protest that in circumstances in which there is real doubt and difficulty in establishing the identity of employees, they should not be expected to produce anything other than a generic description for the purposes of a Regulation 80 determination, which is issued on a "best of judgment basis" under Regulation 80(2). We take the point that in these circumstances HMRC should not be expected to provide precise details of the employees concerned, but our view is that a valid Regulation 80 determination should, as a minimum, provide sufficient information on its face to identify the class or group of employees at which it is directed. In this case HMRC had that information available (as supplied by Abbey Tax) but did not include any clear reference to it in the determinations.

112. Even if we can accept that this generic description falls within the terms of 80(4)(b)(i), we also have doubts whether HMRC have used "best judgment" in issuing the determinations in these generic terms when they did have more specific information (the Abbey Tax schedules) available to them to identify at least a specific class of taxpayers if not individual taxpayers in reliance on the names provided to the Appellant.

113. Our conclusion is that none of the six Regulation 80 determinations issued for the years in dispute comply with the requirements of Regulation 80(4)(b) and that they are not therefore valid determinations.

S 114 Taxes Management Act 1970

114. We have considered whether the Appellant can rely on s 114 Taxes Management Act 1970 to cure the inadequacies of these determinations.

115. The Appellant's arguments on this point reiterated their stance that the determinations must fail if any of the employees to which they were intended to apply did not exist and said that this is not something which can be remedied by s 114 TMA 1970. No "persons" had been identified by HMRC and therefore the determinations were not valid.

116. HMRC argued that any errors in the determinations were not so fundamental as to impact the taxpayer's understanding of them and that s 114 TMA 1970 could be relied on if further clarification was required.

117. Our starting point is that the onus of proof is on HMRC to demonstrate that s 114 can be relied upon here.

118. The *Backhouse* decision referred to by HMRC suggested that one part of the test to decide whether s 114 can be applied is to consider whether the determinations were materially misleading because, in the words of the statute, the person or property charged is not "*designated according to common intent and understanding*".

119. The Appellant's case does not appear to be that the determinations themselves were misleading or confusing, but rather that they were fundamentally flawed because they potentially applied to individuals who did not exist.

120. Although in our view the Appellant's approach does not quite answer the issue, we do have some real doubts about the clarity of the determinations. We are not convinced by HMRC's arguments that because only a small amendment would be required in order to clarify the subject matter of the determinations, the error itself is minor. The fact that an error can be solved by a minor amendment does not necessarily mean that the error itself is minor. A major error can be corrected by a minor change.

121. The second test referred to in *Backhouse* goes to the seriousness or extent of the error. In *Backhouse* the error was the failure to cite a correct statutory reference. In this case, in our view, the error is more fundamental; a failure to properly identify the subject matter of a determination in accordance with the relevant law (Regulation 80). In our view the error of omission made by HMRC in failing to identify any "persons" or "class of persons" in their determinations is a categorical error which is sufficiently significant to be incapable of cure by relying on s 114 Taxes Management Act 1970.

Conclusion on validity of determinations

122. Our conclusion on this point is that none of the determinations issued on the Appellant were validly made under Regulation 80. Therefore the Appellant's appeal against the determinations and the related penalties must succeed.

Other issues

123. If we are correct in this conclusion, we do not need to consider whether the Regulation 80 determinations which were issued for the earlier periods were validly issued by reference to the Appellant's carelessness or whether any penalties should be applied to the Appellant. We have however gone on to consider these questions in case our conclusion in this first point is found not to be correct.

Validity of the assessments for the earlier periods

124. The Regulation 80 determinations for the two periods 2006-7 and 2007-8 were made outside the normal four year time limit for the raising of assessments. HMRC raised these assessments under s 36 Taxes Management Act 1970 on the basis that a loss of tax had arisen as a result of the Appellant's careless conduct.

125. The onus of proof is on HMRC to demonstrate that the Appellant was careless for these periods. Mr Belcher told us that HMRC had informed him at a meeting in September 2006 that P46 forms were not required as long as the relevant information was retained about each new employee. Mr Belcher also said that it was not until the "mass exodus" of employees in March and April 2012 that he realised that there was a problem with the information provided by the employees.

126. HMRC did not provide specific arguments about the Appellant's carelessness for these earlier periods, referring to the Appellant's behaviour for all of the periods in question as at least careless and negligent and its record keeping as "woefully inadequate".

127. The Appellant conceded at the second hearing before us that it had been careless in its record keeping without specifically referring to the P35 end of year returns which are the subject of this appeal.

128. The Regulation 80 determinations for the 2006-7 and 2007-8 periods refer only to the cash payments made and tax due, not to any named employees. We know from the schedule provided by Abbey Tax the names of the employees to whom payments were made for those periods and we saw some of the starter forms for those on that list. All of the forms which we saw had names, addresses and dates of birth. None had National Insurance numbers. Some of the earlier forms also included statements about whether the employee held a reduced liability card and whether they have a work permit.

129. Even taking account of the fact that some relevant information was included on these starter forms, we also have to consider whether, being aware of these new employees, the Appellant was at least careless in completing its P35 end of year returns and not including the relevant information about these individuals.

130. In the light of a persistent failure over six tax years to give information about these employees and on the basis of the Appellant's acceptance that its record keeping has been careless, we have concluded (leaving aside any wider question of validity) that the Regulation 80 determinations for the 2006 -7 and 2007-8 periods were validly issued outside the normal four year time limit under s 36 Taxes Management Act 1970.

Penalties

131. Having concluded in the first part of this decision that none of the Regulation 80 determinations issued by HMRC for the periods in dispute is valid, there are no assessments to additional tax for these periods, therefore any penalty assessments for those periods must also fall away since they are dependent on the tax assessed through the Regulation 80 determinations. However we have given some brief consideration to the penalties levied in case we are wrong in this initial conclusion.

Penalties charged for 2008-9 to 2011-12 periods; deliberate concealment

132. HMRC's penalty assessment notice for these periods referred to inaccuracies under Schedule 24 Finance Act 2007 "Payments made to persons we have been unable to identify" and on the basis that an inaccurate statement was made for each of these years in the Appellant's P35, which stated that P14s had been submitted for all employees, which was not true for the unidentified cash paid employees. The mitigation given by HMRC was 0% for telling, 10% for helping and 10% for access to records by reference to paragraph 9(1) of Schedule 24.

133. HMRC's determination of the penalties under Schedule 24 Finance Act stated in respect of P35s that *"there has been no admission that P35 returns were incorrect. There has been no disclosure of the inaccuracy. There had been no explanation of how the inaccuracy arose."* HMRC set out in their letter to the Appellant of 8 January 2013 what they considered to be deliberate concealment of information.

134. Through the diligent efforts of Mr Saunders, HMRC provided us with evidence that some of the personal information provided to Appellant for some of his employees was not accurate.

135. What HMRC have not demonstrated however, is whether the Appellant was involved in a "deliberate concealment" of the employee's correct identity. Mr Belcher told us about the process for completing the starter forms and that these were signed by the new employees at their place of work and then kept by him. HMRC suggested that some of the signatures on those forms might not have been the employee's signatures, but we accept the point made by the Appellant that for individuals employed in this type of work, signing forms at their place of work, not sitting at a desk, might well not produce consistent signatures.

136. Other than pointing out these discrepancies, HMRC did not produce anything which suggested that the Appellant had been an active party to any attempted concealment, other than by accepting forms which did not contain all relevant information (such as the lack of a home address).

137. Our view is that the evidence points at worst to an Appellant who was willing to turn a blind eye to employees who did not provide all of the required information in an employment situation in which casual workers might often be operating on low wages and outside the remit of the authorities for any number of reasons. We have some doubts whether the Appellant *"deliberately recorded"* inaccurate information. We have no evidence at all that the Appellant "*took active steps to conceal the inaccuracy"*. In fact, as far as any inaccuracy in the P35s is concerned, the starter forms collected by the Appellant demonstrated rather than concealed the in accuracy, since they provided the information not provided elsewhere about the 41 employees who were paid in cash.

138. It seems to the Tribunal that at the start of their enquiries HMRC had taken the view that Mr Belcher, as director of the Appellant, was deliberately falsifying wage payments to individuals who did not exist and paying the wages to himself. By the time the appeal had come before us, HMRC were no longer pursuing this line, however, in considering the appropriate level of penalties, they seem never to have reconsidered their position if, as appears to be the case, they no longer considered that Mr Belcher was attempting to divert cash to himself.

139. On this basis our view is that HMRC have not demonstrated, to the required standard, that the Appellant's actions were deliberate and concealed for any of the periods under dispute.

140. The Appellant accepted before us that its actions had been careless. Carelessness would give rise to penalties at a maximum of 30% of the tax payable. Given the persistence in the Appellant's failure to keep proper records in the face of specific requests from HMRC that it should do so, our view is that the Appellant's actions go beyond mere carelessness and that any penalty should also reflect a deliberate failure to provide the relevant information to HMRC. Deliberate actions give rise to a maximum penalty of 70% under paragraph 4(2) of Schedule 24.

Periods 2008-9 to 2011-12

141. For these periods, based on the criteria set out in paragraph 9 of Schedule 24 and adopting the weightings which we understand that HMRC apply to the three elements of disclosure and applying the same approach for each of the 2008-9 to 2011-12 periods, we have concluded that the appropriate level of penalty is 47 % of the tax payable.

142. On the basis that the Appellant's disclosure was prompted the possible mitigation for disclosure under paragraphs 9 and 10 of Schedule 24 can reduce the penalty from 70% to no less than 35% depending on the Appellant's behaviour in disclosing the inaccuracy.

143. Using the three criteria set out in paragraph 9(1) of Schedule 24 our view is that the Appellant did give HMRC the information which it requested at a relatively early stage; the "starter forms" were shown to HMRC at the initial meeting in March 2012. This was followed up with the list of employees provided to HMRC in March 2013 and the schedules provided by Abbey Tax in November and December 2013. HMRC suggested that the Appellant had been dilatory in providing that information, but we do not consider that this is relevant to this element of mitigation. Our view is that the level of mitigation which should be given for disclosure is the maximum 20% level rather than the nil given by HMRC.

144. As far as co-operation is concerned, we accept HMRC's point under this head about the length of time which it took for the Appellant to provide the relevant information but note that the basic information in the form of the starter forms was provided in March 2012, the later information provided to HMRC in the format which they requested and the schedules provided by Abbey Tax were a reworking of that information in a format more readily accessible. We have also taken account of HMRC's own change of focus and direction in its enquiries; from suggesting that the employees did not exist at all to accepting that they did but that returns were inaccurate. For this reason we have concluded that the level of mitigation for co-operation should be increased from the 10% given by HMRC to 25%.

145. Finally in respect of the giving of access to records, HMRC's gave a 10% reduction only under this head because they had asked for but not received P46s from the employees who left in March 2012. Our view is that the mitigation under this head must be similar, if not the same, as the mitigation given for co-operation, since both relate to the giving of documents by the Appellant. The Appellant had kept some relevant information in the format of the starter forms and did provide these to HMRC

when requested. Our view is that a mitigation of 20% should be given under this head.

Conclusion on penalties for 2008-9 to 2011-12 periods

146. Overall our view is that there should be an increase in the level of mitigation given for the penalties in this period from the 10% of the 100% penalty range given by HMRC to a 65 % reduction in the 35% difference in the statutory penalty range for deliberate but not concealed actions, resulting in an overall mitigation of 65 x 35 = 22.75%, reducing the 70% maximum penalty to a rounded 47% of the lost revenue for these periods.

147. As indicated above, this conclusion is only relevant if we are wrong in our conclusion that none of the Regulation 80 determinations issued by HMRC for the periods in dispute is valid.

Penalties for the periods 2006-7 and 2007-8 Regulation 73 of the PAYE Regulations

148. HMRC's penalty determination letter relating to these earlier periods refers to the failure to submit correct end of year returns. The penalty is charged under s 98A(4) TMA 1970 and Regulation 73(10) of the PAYE Regulations. Under those rules a penalty of up to 100% of the tax due can be applied if the Appellant's behaviour is either fraudulent or negligent.

149. The maximum penalty chargeable was 100% of the tax due, £21,917.77. Mitigation was applied as explained in HMRC's letter of 10 February 2014 at 10% - 0% for disclosure, 10% for co-operation and 0% for seriousness.

150. Mr Saunders explained that he had reduced the penalties for these earlier periods by the same 10% level as he had mitigated the penalties for the later periods but we were not given the same level of detailed explanation in respect of these penalties.

151. We have followed the same non-statutory methodology as HMRC in considering the level of penalty which is properly chargeable under s 98A TMA 1970, but note that the test under s 98A(4) TMA 1970 is different from the test for the later periods, referring to returns made either *fraudulently or negligently* with a 100% maximum for both. HMRC did not suggest that the Appellant had acted fraudulently.

152. In respect of disclosure, our view is that the Appellant, through Mr Belcher, did provide all the information which it had relating to the cash paid employees, at the meeting of March 2012 when the starter forms were produced for each employee. Our view is that mitigation for disclosure should be 20% in these circumstances.

153. For similar reasons, despite taking some time to produce exactly the information requested by HMRC, our view is that there was some significant co-operation by the Appellant in providing the information which HMRC ultimately used to make its Regulation 80 determinations. It is not clear from the evidence that any delay in

providing this information was deliberate. For these reasons we have concluded that a mitigation of 25% for co-operation is appropriate.

154. Finally, considering the seriousness of the Appellant's mis-declaration, we have taken account of the repetition of the mis-declaration through successive periods and the amount of tax at stake, which was a significant percentage of all the PAYE which the Appellant was obliged to pay (nearly 50% of the Appellant's total payroll on the estimates which the Appellant provided of its average number of employees). Bearing in mind our conclusion that there has been no deliberate concealment in this case, our view is that the mitigation for seriousness should be 15% of the maximum 40% available under this head, rather than the 0% suggested by HMRC.

Conclusion on penalties for 2006-7 and 2007-8 periods

155. Taking all of the above together we have concluded that for the periods 2006 -7 and 2007-8 the total level of mitigation should be increased from the 10% given by HMRC to 60%, resulting in penalties payable equal to 40% of the tax due for both of those periods.

156. Again, as we have stated above, this conclusion is only relevant if we are wrong in our conclusion that none of the Regulation 80 determinations issued by HMRC is valid.

Costs

157. In accordance with the Tribunal's directions, the Respondents made a written application for wasted costs under Rule 10(2) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 relating to its costs of attending the first hearing on 29 July 2015. That hearing was adjourned after the Appellant's representative made an oral application to call Mr Saunders of HMRC as a witness.

158. The Tribunal's power to make a wasted costs order derives from s 29(4) of the Tribunals Courts and Enforcement Act 2007.

159. The Respondents request costs of £541.96 in their schedule of costs covering the time of their representative in travelling to and attending the tribunal hearing on 29 July 2015 and re-drafting speaking notes for the adjourned hearing.

160. The Appellant's written response to the Respondents' application stated that "*the data submitted in respect of their claim does not seem to correspond to a wasted costs claim*".

161. The Respondents say that the Appellant's representative's oral application to call Mr Saunders as a witness on the day of the tribunal hearing was unreasonable in the light of the clear directions issued by the Tribunal to him on 7 April 2015 to confirm whether witnesses were to be called and the timeline for providing this information and taking account of the Appellant's representative's experience in dealing with tax investigations and the tax tribunal.

162. We agree with the Respondents that the very late application for the witness evidence of Mr Saunders was unreasonable in the light of all the circumstances and the very clear guidance given to the Appellant's representative about the need to notify the Tribunal in advance if any witnesses were to be called. Mr Arthur did not provide a sufficient explanation as to why a decision to call Mr Saunders had been made so late, only referring to the fact that the hearing bundles had been received three days before the hearing due to an administrative error.

163. We accept the Respondents' schedule of costs and expenses and make an order for costs accordingly.

164. 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.

Rachel Short
TRIBUNAL JUDGE

RELEASE DATE: 6 June 2017