[2018] UKFTT 744 (TC)

TC06877

Appeal number: TC/2017/02170

CONSTRUCTION INDUSTRY SCHEME – penalties for late filing of CIS returns – s 98A Taxes Management Act 1970 – schedule 55 to Finance Act 2009 – proportionality – special circumstances – reasonable excuse – effect of paragraph 17(3) of Schedule 55 to Finance Act 2009 – appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

ADVANCED SCAFFOLDING (BRISTOL) LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE ROBIN VOS

Sitting in public at Bristol Civil & Family Justice Centre on 12 November 2018

Mr David Richards of Pearson May, accountants, for the Appellant

Chris Jones, Presenting Officer of HM Revenue & Customs, for the Respondents

© CROWN COPYRIGHT 2018

DECISION

Background

1. The appellant provides scaffolding for construction projects. It is a relatively small family business with a turnover in the region of £1 million per annum. The sole director is Miss Debbie Cox who gave evidence at the hearing.

2. In November 2015, HMRC decided to carry out a compliance check of the appellant's business looking in particular at PAYE and the appellant's obligations under the Construction Industry Scheme ("CIS").

3. As part of that check, it was discovered that the appellant had inadvertently failed to appreciate that certain payments to two suppliers, Pocock Building Services Limited ("Pocock") and CS Scaffolding Limited ("CSSL") should have been reported to HMRC under the CIS on the company's monthly CIS returns although, in the case of the vast majority of the payments, no tax was due as the appellant was entitled to pay the recipient without deduction of tax.

4. In total, HMRC identified 28 months when payments were made and returns should have been submitted. They have charged penalties totalling £22,600 in respect of these failures.

5. The penalties have been charged under s 98A Taxes Management Act 1970 ("TMA") for defaults in 2009 and 2010. Penalties for 2012-2015 have been charged under schedule 55 to Finance Act 2009 ("schedule 55") which replaced the previous regime in 2011.

6. The appellant appeals against all of these penalties and/or against the amount of the penalties principally on the basis that it has a reasonable excuse for the failures and/or that the amount of the penalties is disproportionate in the circumstances.

7. At the hearing I raised a question as to whether the fact that the defaults related to multiple returns could constitute a special circumstance justifying a reduction in the amount of the penalties in the light of the decision of the First-Tier Tribunal in *Welland v HMRC* [2017] UKFTT 0870. The parties had not come prepared to make submissions on this point and so I requested them to make written submissions. Both parties have provided submissions which I have taken into account in reaching my decision.

8. Mr Richards also made a number of points in his written submissions relating to the question as to whether the appellant had a reasonable excuse for its failure to file the returns on time. These points however simply repeated the submissions which were made at the hearing and, to that extent, I have taken them into account.

9. Mr Richards also raised a new point relating to the calculation of the penalties in the light of the First-Tier Tribunal's decision in *Jagger v HMRC* [2018] UKFTT 0623. I would not normally have considered this point as it was not raised at or

before the hearing. However, HMRC had seen Mr Richards' submissions in advance of making their own written submissions and have dealt with this point in their written submissions. I have therefore decided to take this into account as part of my decision.

The evidence and the facts

10. The evidence consisted principally of a bundle of documents and correspondence produced by HMRC. However, Mr Richards produced four further documents at the hearing which the Tribunal agreed to accept as part of the evidence.

11. As mentioned above, Miss Cox also gave oral evidence. I have no hesitation in accepting Miss Cox's evidence.

12. On the basis of this evidence, I find the following facts. There is no significant dispute in relation to the facts.

13. The appellant originally started operating the CIS many years ago. The reason it needed to do so was because, as was common at the time, its labour force were mostly treated as sub-contractors. This practice ceased some time ago when HMRC required such individuals to be treated as employees. The appellant has however submitted returns under the CIS on a reasonably regular basis during the period in which the defaults occurred.

14. Miss Cox does not get involved in the actual work carried out by the appellant but takes responsibility for all relevant paperwork including any returns required under the CIS.

15. The payments to Pocock relate to the provision of netting/sheeting which is wrapped around the scaffolding. In some cases, Pocock would simply supply the netting which was then fitted by the appellant's own employees. However, in most cases, Pocock both supplied and fitted the netting. This distinction was reflected in the relevant invoices submitted by Pocock which would refer either to "supply" or to "supply and fit" the netting.

16. It is not entirely clear what the payments to CSSL relate to. However, on the basis that neither party suggested otherwise, I infer that the position was similar – i.e. that CSSL principally provided materials but also provided some labour in respect of those materials.

17. The arrangements for the supplies made by Pocock and CSSL were made by the manager dealing with the relevant projects and not by Miss Cox.

18. Pocock had "gross payment status" for the purposes of the CIS. This means that no deduction was required to be made when payments were made to Pocock, even if the payments fell within the CIS.

19. CSSL did not have gross payment status which meant that any CIS payments made to CSSL should have had tax deducted. The total amount of tax which should have been deducted from the payments to CSSL is in the region of £2,500.

20. Miss Cox had always understood that Pocock and CSSL had supplied only materials. She did not appreciate that they had also supplied labour. She had therefore always allocated their invoices to the “purchases” section of the appellant’s accounts and not the section for “sub-contracted labour”. On this basis, she also did not complete CIS returns in respect of these payments as she thought that they fell outside the CIS as being the supply of materials rather than a supply of labour.

21. The appellant submitted CIS returns for all of the previous months which were outstanding on 15 December 2015.

22. HMRC assessed penalties for all of these months on 16 June 2016.

The CIS regime and penalties for late filing

23. Paragraph 4 of the Income Tax (Construction Industry Scheme) Regulations 2005 (“CIS Regulations”) requires a contractor to make monthly returns in respect of all payments to sub-contractors. This includes payments to sub-contractors who are registered for gross payment and where no tax therefore has to be deducted by the contractor making the payment.

24. The returns are due by the 19th of each month (14 days after the end of the “tax month”).

25. Prior to 6 April 2015, a contractor was required to make a nil return even where there were no relevant payments in that month if payments had been made in the previous month (paragraph 4(10) of the CIS Regulations).

26. Where a CIS return is not delivered on time, a penalty is payable. Until October 2011, the penalty regime was contained in the TMA. The amount of the penalties was set out in s 98A TMA. This provided for a fixed penalty of £100 per month (assuming there were less than 50 sub-contractors, as there were in this case) for each of the first 12 months. If the return was more than 12 months late, HMRC had discretion to charge a further penalty of up to £3,000.

27. Section 102 TMA gives HMRC complete discretion to reduce any penalty charged under s 98A TMA as they see fit.

28. Section 118(2) TMA provides that no penalty is payable if the taxpayer has a reasonable excuse for the failure and the failure is remedied without unreasonable delay after the failure ceases.

29. Section 103(4) TMA allows a penalty to be charged “at any time within six years after the date on which the penalty was incurred or began to be incurred”. In this case, the returns were due in January, February, March and May 2010. However, it is clear from s 98A TMA that each monthly penalty is a separate penalty. As a result of this, HMRC have only charged penalties in respect of these returns for months after June 2010 (the penalties being assessed in June 2016).

30. From November 2011, the penalty regime in the TMA was superseded by a new regime contained in schedule 55.

31. The amount of the penalties is contained in paragraphs 8-11 of schedule 55. In the present circumstances, those penalties comprise an initial penalty of £100, a further penalty of £200 if the return is more than two months late, another penalty of a minimum of £300 if the return is more than six months late and an additional penalty, again of a minimum of £300, if the return is more than 12 months late – i.e. the minimum penalty for a return which is more than 12 months late is £900 in total.

32. As with the previous regime, no penalty is due if the taxpayer has a reasonable excuse for the failure (paragraph 23 of schedule 55).

33. There is an additional feature in schedule 55 which is that HMRC have power to reduce a penalty if there are special circumstances making it right to do so (paragraph 16 of schedule 55). The Tribunal may only interfere with HMRC's decision in relation to special circumstances if that decision is "flawed" in a judicial review sense (paragraphs 22(3) and (4) of schedule 55).

34. When the new penalty regime in schedule 55 was introduced, HMRC took a policy decision that it would use its power under s 102 TMA to mitigate any penalties under the old regime so that they did not exceed the amount which would be charged under schedule 55.

35. In this case, HMRC have exercised their power under s 102 to reduce the penalties under the old regime from £6,100 to £3,000.

Have the penalties been properly charged

36. Mr Jones took the Tribunal through the requirements which have to be satisfied in order for HMRC to charge the penalties in question. He submits that the relevant conditions are satisfied and that the penalties have been correctly calculated.

37. Mr Richards did not suggest otherwise at the hearing. However, in his written submissions, he referred to the decision of the First-Tier Tribunal in *Jagger v HMRC* [2018] UKFTT 0623 (TC). That case dealt with penalties under schedule 55 for the late filing of self-assessment tax returns and, in particular, considered the impact of paragraph 17(3) of schedule 55 which provides as follows:

> "17(3) Where P is liable for a penalty under more than one paragraph of this Schedule which is determined by reference to a liability to tax, the aggregate of the amounts of those penalties must not exceed the relevant percentage of the liability to tax."

38. The penalties in *Jagger* were charged under paragraphs 3, 4, 5 and 6 of schedule 55. The penalties charged under paragraph 5 and paragraph 6 of schedule 55 are very similar to the penalties charged in this case under paragraph 10 and paragraph 11 of schedule 55 in that the penalty is whichever is the greater of five per cent (5%) of the tax in question and £300.

39. The decision of the Tribunal in *Jagger* was that, although the penalty might be a fixed amount of £300, it was still "determined by reference to a liability to tax" as it had to be confirmed that 5% of the tax was less than £300. The result of this was that paragraph 17(3) of schedule 55 was engaged and the penalties could not exceed the relevant percentage of the liability to tax.

40. In accordance with paragraph 17(4) of schedule 55, the relevant percentage in that case was 100%. However, as the liability to tax was nil, the maximum which could be charged was also nil (as 100% of nothing is zero).

41. HMRC's view is that *Jagger* was wrongly decided although no detailed reasons for this are given in their written submissions.

42. In any event, HMRC say that, even if *Jagger* is correct, the position is different where the penalties are charged under paragraphs 10 and 11 of schedule 55. The reason for this is that paragraphs 10(2) and 11(5) of schedule 55 do not refer to any "liability to tax" (as mentioned in paragraph 17(3) of schedule 55) but instead refer to "any liability to make payments which would have been shown in the returns in question".

43. HMRC point out that the appellant has not been charged a penalty by reference to any tax liability of the appellant. The obligation of the appellant was to make deductions in respect of the tax liability of the sub-contractor.

44. Although the wording of paragraph 17(3) is unfortunate, it cannot in my view have been the intention of Parliament that the limit on the aggregate penalties provided for by paragraph 17(3) of schedule 55 should not apply to penalties relating to the late filing of CIS returns whereas it does apply in relation to the late filing of other returns.

45. Paragraph 17(3) of schedule 55 does not in any event require that the "liability to tax" is a liability of the person making the return. HMRC accept that the amount of the CIS deductions have some connection with the sub-contractor's liability to tax and, taking a purposive interpretation of schedule 55, I think it must be accepted that, even though paragraphs 10 and 11 of schedule 55 refers to a percentage of any liability to make payments which would have been shown in the CIS return, the penalty is, in these circumstances still "determined by reference to a liability to tax".

46. Having said this, I cannot, with respect, accept the conclusion of the Tribunal in *Jagger*. It seems to me that Parliament has provided for a scheme of penalties where a minimum amount is payable whether or not any tax is due. There cannot be any doubt that this is the case in respect of penalties both for self-assessment tax returns and for CIS returns where the return is less than six months late. There is nothing in schedule 55 which suggests that this is not also the case for returns which are 6 or 12 months late.

47. If this were not the case the result would be that if a return where no tax was due was filed more than 6 months late but less than 12 months late, the minimum penalty of £300 would be payable but if the taxpayer waited until the return was more than 12

months late, neither the 6 month late filing penalty nor the 12 month late filing penalty would be payable.

48. The reason for this is that paragraph 17(3) of schedule 55 only applies if the taxpayer is liable for a penalty which is determined by reference to a liability to tax under more than one paragraph of schedule 55. If the only tax related penalty is the six month penalty there is, on any basis, only one penalty which is determined by reference to a liability to tax and so paragraph 17(3) of schedule 55 does not apply.

49. Instead, the more natural reading of paragraph 17(3) of schedule 55 is that it is intended to ensure that where there is a liability to the much higher penalties which can be payable where a return is more than 12 months late and there has been a deliberate withholding of information, the total tax geared penalties cannot exceed the maximum chargeable on that occasion. This is apparent from the fact that the "relevant percentage" referred to in paragraph 17(3) of schedule 55 is the same as the maximum penalty which can be charged where there has been a deliberate withholding of information. For example, the relevant percentage as far as penalties chargeable under paragraph 11 of schedule 55 are concerned is 100% and the maximum penalty which can be charged under paragraph 11(3) is 100%.

50. My conclusion therefore is that the reference in paragraph 17(3) of schedule 55 to a penalty which is determined by reference to a liability to tax is to a penalty which is actually calculated as a percentage of an amount of tax and not to a situation where the penalty which is charged is the fixed minimum of £300.

51. On this basis, I am satisfied that the relevant conditions for charging the penalties exist and that they have been correctly calculated.

52. I therefore turn to the remaining questions which are whether the penalties are disproportionate, whether the appellant has a reasonable excuse for its failure and whether there are any special circumstances which would justify a reduction in the amount of the penalties charged under schedule 55.

Proportionality

53. Mr Jones drew the Tribunal's attention to the decision of the Upper Tribunal in *HMRC v Bosher* [2013] UKUT 0579 (TCC). In relation to the penalty provisions in TMA, the Upper Tribunal confirmed in that case that the Tax Tribunal has no power to reduce a penalty because it is unfair (i.e. disproportionate), that the penalty regime as a whole is not disproportionate and that if an individual taxpayer believes that an individual penalty is disproportionate, their only remedy is to bring proceedings for judicial review (see paragraphs 17, 28, 46 and 47 of the Upper Tribunal decision).

54. Mr Richards acknowledges that the decision in *Bosher* is binding on the First-Tier Tribunal. However, he nevertheless urges the Tribunal to review HMRC's refusal to mitigate the penalties any further.

55. In this context, he drew attention to the decision of the First-Tier Tribunal in *Le Bistingo Limited* [2013] UKFTT 524 and in particular the comment [at 23] that:

> "Whilst the legality of legislation could be challenged in judicial review proceedings, such actions are not of right and in a case like this, which does not involve significant sums of money and legal advice, is not in practice an option, and therefore not an effective remedy."

56. Mr Richards also referred to a statement published by HMRC on 5 June 2015 in relation to self-assessment penalties which includes the following:

> "We want to focus more and more of our resources on investigating major tax avoidance and evasion rather than penalising ordinary people who are trying to do the right thing."
>
> and
>
> "This is part of our planned, proportionate approach to penalty appeals, particularly for small businesses and individuals."

57. Mr Richards submits that Miss Cox is an ordinary person trying to do the right thing and that the penalties which HMRC have charged are anything but a proportionate approach for this particular small business, particularly bearing in mind that there was no loss of tax.

58. Whilst I have some sympathy for Mr Richards' arguments, it is clear that, at least in relation to the previous penalty regime in the TMA, the First-Tier Tribunal is bound by the decision in *Bosher* and cannot consider issues such as proportionality or unfairness. Instead, the only remedy for the taxpayer is to bring an action for judicial review.

59. I echo the comments of the Tribunal in *Le Bistingo* that, in many cases, the cost of judicial review will be prohibitive. However, the Upper Tribunal in *Bosher* was clear [at 39] that the hurdles are not so great as to amount to a denial of access to justice.

60. As far as schedule 55 is concerned, Mr Jones argues that the reasoning in *Bosher* continues to apply given that there is no liability to a penalty if there is a reasonable excuse and that HMRC has power to reduce a penalty if there are special circumstances which make it right to do so.

61. In my view, this must be right, particularly as the First-Tier Tribunal is itself given a judicial review power in relation to HMRC's decision as to whether or not there are any special circumstances which justify a reduction in the amount of the penalty, thus avoiding the cost of separate judicial review proceedings. I return below to the question as to whether there are in this case any special circumstances which would justify a reduction in the amount of the penalties.

62. Subject to this point however, the Tribunal has no power to reduce or mitigate these penalties on the basis that they are unfair or disproportionate.

Reasonable excuse

63. Mr Richards submits that the appellant has a reasonable excuse for the failure to file the CIS returns.

64. This is based on Miss Cox's failure to appreciate that the relevant supplies were not only supplies of materials but also supplies of labour and that, as a result, the payments fell within the CIS.

65. In support of this, Mr Richards drew attention to the fact that Miss Cox did not herself visit the construction sites, and that she was not responsible for procuring the supplies made by the relevant companies. All she ever received was the invoices and, although Mr Richards accepts that, if the invoices are read closely, it can be seen that an element of labour is included, he submits that it was reasonable for Miss Cox to conclude that the supplies related to materials alone.

66. The second point referred to by Mr Richards is that the CIS Regulations are complex and that allowance should be made for the fact that Miss Cox is a lay person with no financial training or background. He makes the point that there are no specific qualifications or training required for somebody to act as a director of a company and that it would not be reasonable to expect Miss Cox to have these sorts of skills or experience just because she is the director of the company.

67. In summary, Mr Richards says that Miss Cox made a genuine mistake for which she is contrite and which has led her to undertake relevant training. That mistake he submits is a reasonable one given the complexity of the CIS Regulations and Miss Cox's genuine belief that Pocock and CSSL were supplying materials and not labour.

68. Mr Jones' position is that Miss Cox should have been more aware of what was required under the CIS. He makes the point that there was not a one-off error but instead there were 28 months when returns should have been submitted which were not submitted. In addition, there were a further 21 months when nil returns should have been submitted but which were not submitted (although HMRC have not charged any penalty in respect of these nil returns).

69. Mr Jones relied on the fact that the appellant's accounts had an entry for sub-contracted labour and also that the invoices made it clear that what was being supplied was not just materials but also labour in order to fit those materials.

70. In addition, Mr Jones argues that it is not objectively reasonable that Miss Cox did not know that she had to file CIS returns for sub-contractors who were authorised to receive gross payments.

71. The test as to whether a taxpayer has a reasonable excuse for failure is an objective test. The question is what a reasonable taxpayer, intending to comply with their obligations, would have done in all the circumstances and whether the taxpayer fell short of those standards.

72. There has been some debate as to whether or not ignorance of the law can be a reasonable excuse. Mr Jones referred to the recent decision of the Upper Tribunal in

Christine Perrin v HMRC [2018] UKUT 156(TC). The Upper Tribunal decided [at 82] that there is no general rule in this context that ignorance of the law cannot constitute a reasonable excuse but warned that:

> "Some requirements of the law are well-known, simple and straightforward but others are much less so. It will be a matter of judgement for the FTT in each case whether it was objectively reasonable for the particular taxpayer, in the circumstances of the case, to have been ignorant of the requirement in question, and for how long."

73. I have decided in this case that the appellant does not have a reasonable excuse for the failure.

74. It is not entirely clear whether Miss Cox did not appreciate that any labour was being provided or whether she thought that because the supplies were principally a supply of materials, the fact that labour was being provided in order to fit the netting/sheeting, was not enough to bring the payments within the CIS.

75. If it is the case that Miss Cox did not appreciate that labour was being provided as well as materials, this is not in my view a reasonable excuse, it was clear from the invoices that labour was being provided. In addition, the appellant's site managers clearly would have known that labour was being provided in order to fit the netting and could have brought this to Miss Cox's attention.

76. If, on the other hand, the problem was that Miss Cox did not realise that the work involved in fitting the netting/sheeting was enough to bring the CIS into play, whilst this may be a mistake as to the law, it is not one which, in the circumstances of this case, provides a reasonable excuse.

77. The appellant is in the construction business and must therefore be expected to understand the basics of the CIS. The underlying principle is that if a contractor engages somebody else to carry out construction work, any payments must be dealt with under the CIS. If Miss Cox knew that Pocock and CSSL were providing labour as well as materials, this should at the very least have put her on enquiry as to whether or not the CIS might apply. It was not reasonable for her to assume that the contracts remained outside the CIS simply because they also involved a supply of materials.

78. There was a separate issue put forward as to whether or not Miss Cox knew that a payment to a sub-contractor who was registered for gross payment status still had to be reported on a CIS return. However, Miss Cox's evidence was that the question of gross payment status for Pocock and CSSL was only raised after HMRC's compliance check. It was not something which was in her mind or which had been verified at the time the relevant invoices were paid as, at that time, she believed that the payments did not fall within the CIS and so she had no reason to consider the CIS status of the recipients. This point is not therefore relevant to the question as to whether the appellant had a reasonable excuse for the failure.

79. As there is no reasonable excuse for the failure and the First-Tier Tribunal cannot consider the question of proportionality, it follows that the penalties which have been

charged under s 98A TMA totalling £3,000 are upheld as there is no other basis for the appeal against those penalties. However, as far as the penalties charged under schedule 55 are concerned, I need to consider whether there are any special circumstances which would justify a reduction in the amount of the penalties.

5 **Special circumstances**

80. As mentioned above, the Tribunal can only consider whether there are special circumstances justifying a reduction in the amount of the penalties if HMRC's decision on this aspect is "flawed" in a judicial review sense.

81. HMRC, in their written submissions, point out that they have considered special
10 circumstances both in their "view of the matter" letter dated 9 August 2016 and also in their statement of case. They also make the point that in accordance with the decision in *Bluu Solutions Limited* [2015] UKFTT 95 [at 110] HMRC have until the conclusion of the hearing to exercise their discretion in relation to special circumstances.

15 82. I agree with the reasoning in *Bluu Solutions* and indeed the Tribunal's conclusion [at 122] that HMRC may make a decision in relation to special circumstances at any time before the Tribunal makes its decision. In this case, that would include making a decision in relation to special circumstances in its written submissions delivered to the Tribunal after the hearing had taken place but before the decision was made.

20 83. HMRC does not however purport to make a new decision in relation to special circumstances in its written submissions. Instead, they focus on the decision which was made in their "view of the matter" letter and their statement of case and submit that HMRC has taken into account all of the factors presented by the appellant, does not consider there to be any special circumstances and that their decision is not flawed
25 in a judicial review sense.

84. Looking first at HMRC's "view of the matter" letter dated 19 August 2016, the only factor which HMRC refer to in the context of special circumstances is that, in relation to some of the returns in question, no CIS deductions would have been required.

30 85. As far as HMRC's statement of case is concerned, they refer only to the fact that they would have issued the appellant with a guidance pack when it registered for the CIS, that there is extensive guidance available online and that there is no evidence that the appellant contacted HMRC to verify the status of Pocock or CSSL. No other circumstances are mentioned which HMRC have taken into account in reaching their
35 decision.

86. It is therefore clear to me that HMRC's decision is flawed in a judicial review sense as they have not taken into account all of the relevant circumstances. In particular, HMRC have not taken into account all of the points which had been put forward by Mr Richards on behalf of the appellant before HMRC made its decisions
40 including the fact that the appellant (and Miss Cox) is otherwise a compliant taxpayer, that there was a genuine mistake and that the amount of the penalties is

disproportionate based on the amount of tax due. They have also not taken into account the fact that a single mistake led to a failure to file multiple returns which in turn gave rise to multiple penalties and which, although not a point raised by the Appellant, was clearly something HMRC were aware of when they made their decisions.

87. I should say at this point that I do not suggest that these circumstances are necessarily "special". However, the fact is that HMRC have not taken them into account and considered whether any of them might amount to a special circumstance which would justify a reduction in the amount of the penalties.

88. As HMRC's decision in relation to special circumstances is flawed, the Tribunal must make its own decision as to whether there are any special circumstances which would justify a reduction in the amount of the penalties.

89. HMRC submit that, in order to be "special" the circumstances must be "peculiar or distinctive" and must also be confined to a particular taxpayer or possibly a class of taxpayers.

90. They do not provide any authority for the first assertion although it appears to be derived from the decision of the First-Tier Tribunal in *Warren v HMRC* [2012] UKFTT 57 (see paragraph [94] below).

91. As far as the requirement for the circumstances to relate to a particular taxpayer is concerned, HMRC refer to the decision of the First-Tier Tribunal in *Collis v HMRC* [2011] UKFTT 588 where the Tribunal said [at 40] that:

> "to be a special circumstance the circumstance in question must operate on the particular individual, and not be a mere general circumstance that applies to many taxpayers by virtue of the scheme of the provisions themselves".

92. There is no definition of what constitutes special circumstances. HMRC often refer to *Clarks of Hove Limited v Bakers Union* [1978] 1 WLR 1207 where the Court of Appeal (in a different context) suggested [at 1215H] that:

> "… to be special the event must be something out of the ordinary, something uncommon; …"

93. HMRC also regularly refer to *Crabtree v Hinchcliffe (Inspector of Taxes)* [1972] A.C.707 where Viscount Dilhorne said (again, in a rather different context) [at 739E] that:

> "For circumstances to be special [they] must be exceptional, abnormal or unusual …"

94. In *Warren v HMRC* [2012] UKFTT 57, the First-Tier Tribunal considered [at 54] that:

> "The adjective 'special' requires simply that the circumstances be peculiar or distinctive. But that does not necessarily mean

> that the circumstances which affect most taxpayers could not be special: an ultra vires assertion by HMRC that for a period penalties would be halved might well be special circumstances; but generally special circumstances will be those confined to particular taxpayers or possibly classes of taxpayers. They must encompass the situation in which it would be significantly unfair to the taxpayer to bear the whole penalty."

95. This was followed by the First-Tier Tribunal in *Welland v HMRC* [2017] UKFTT 0870 where, after referring to the passage recited above from *Warren*, the judge stated [at 125] that:

> "What was said in *Warren* seems right, if very general. … In summary, it seems to me that the alleged special circumstances must be an unusual event or situation which does not amount to a reasonable excuse but which renders the penalty in whole or part significantly unfair and contrary to what Parliament must have intended when enacting the provisions."

96. It might be thought that this definition runs contrary to the decision of the Upper Tribunal in *Bosher* which made it clear that the First-Tier Tribunal did not, in the context with which it was dealing, have power to consider whether a penalty was unfair.

97. In this context, HMRC refer in their written submissions to the decision of the Upper Tribunal in *HOK Limited* [2012] UKUT 363 (TCC). The Upper Tribunal in *HOK* as in *Bosher* emphasised that the First-Tier Tribunal has no general power to reduce a penalty on the basis that it is perceived to be unfair. It can only reduce a penalty if there is a statutory power to do so.

98. However, it must be remembered that both *HOK* and *Bosher* were dealing with the previous penalty regime under TMA where there was no equivalent to paragraph 16 of schedule 55 relating to special circumstances. The fact is that, under schedule 55, the Tribunal has been given a specific, limited judicial review power and there is no reason why the First-Tier Tribunal cannot, in exercise of that power, consider whether a penalty is unfair if that unfairness results from special circumstances or is itself a special circumstance based on the particular facts of the case.

99. Coming back to the meaning of the phrase "special circumstances", there is my view no reason for the Tribunal to seek to restrict the wording of paragraph 16 of schedule 55 by adding what is sometimes referred to as a "judicial gloss".

100. In saying this, I have in mind the comment made by Lord Reid in *Crabtree v Hinchcliffe,* [at 731E] when considering the scope of "special circumstances" that:

> "the respondent argues that this provision has a very limited application.... I can see nothing in the phraseology or in the apparent object of the provision to justify so narrow a reading of it".

101. I appreciate that care must be taken in deriving principles based on cases dealing with different legislation. However, I can see nothing in schedule 55 which evidences any intention that the phrase "special circumstances" should be given a narrow meaning.

5 102. It is clear that, in enacting paragraph 16 of schedule 55, Parliament intended to give HMRC and, if HMRC's decision is flawed, the Tribunal a wide discretion to reduce a penalty where there are circumstances which, in their view, make it right to do so. The only restriction is that the circumstances must be "special". Whether this is interpreted as meaning out of the ordinary, uncommon, exceptional, abnormal, 10 unusual, peculiar or distinctive does not really take the debate any further. What matters is whether HMRC (or, where appropriate, the Tribunal) consider that the circumstances are sufficiently special that it is right to reduce the amount of the penalty.

103. In relation to the suggestion that in order to be a "special circumstance", the 15 circumstance must operate on the particular individual, in the context of road traffic offences, the judge in *Whittal v Kirby* [1947] KB 194, appeared to come to a slightly different conclusion to the Tribunal in *Collis* (see paragraph [91] above), stating (at page 201) that:

> "a "special reason" within the exception is one which is special 20 to the facts of the particular case, that is, special to the facts which constitute the offence. It is, in other words, a mitigating or extenuating circumstance, not amounting in law to a defence to the charge, yet directly connected with the commission of the offence, and one which the court ought properly to take into 25 consideration when imposing punishment. The circumstance peculiar to the offender as distinguished from the offence is not a "special reason" within the exception."

104. Part of that passage was quoted (but not with particular approval) by the Court of Appeal in *Clarks* of *Hove* which went on to say [at 1215F] that:

> 30 "in so far as that means that the special circumstance must be relevant to the issue then that would apply equally here, but in these circumstances, the Employment Protection Act 1975, it seems to me that the way in which the phrase was interpreted by the Industrial Tribunal is correct. What they said, in effect, was 35 this, that insolvency is, on its own, neither here nor there. It may be a special circumstance, it may not be a special circumstance. It will depend entirely on the cause of the insolvency whether the circumstances can be described as special or not".

105. The principle which I derive from what the Court of Appeal seems to be saying 40 is that a special circumstance may or may not operate on the person involved but that what is key is whether the circumstance is relevant to the issue under consideration.

106. Based on this my view is that the right approach for the Tribunal is to look at all the relevant circumstances and consider whether, in the particular case in question,

those circumstances are "special". I see no reason to limit this to circumstances which, as suggested by the Tribunal in *Collis*, operate on the particular taxpayer in question as opposed to those which could affect a larger number of taxpayers. It is up to HMRC or, where relevant, the Tribunal to decide based on all of the facts of the particular case whether the circumstances in question are, in that case, special.

107. I shall therefore consider whether there are any special circumstances and, if so, whether any of them justify a reduction in the amount of the penalties.

108. Mr Richards suggested that one reason the penalties should be reduced is that both the appellant and Miss Cox have unblemished compliance records in relation to their other tax affairs, thus demonstrating that they take a responsible attitude to tax compliance. Whilst this is commendable, it is not in my view a special circumstance. On the contrary, filing tax returns on time should be what is normal rather than being something unusual.

109. Mr Richards has consistently stressed the fact that the appellant and Miss Cox made a genuine mistake in not realising that the payments in question fell within the CIS. I have found that this does not constitute a reasonable excuse. That does not mean it cannot be a special circumstance. However, I think it would be very surprising if a mistake of this nature could constitute a special circumstance. Indeed, part of the purpose of the penalty regime is to encourage people not to make mistakes and to file their returns on time.

110. The other two points put forward by Mr Richards are related. This is that there was no loss of tax and that the penalties are disproportionate in relation to the amount of tax which was ultimately found to be due.

111. As to the fact that no tax was due, it is clear that Parliament has enacted a penalty regime under which penalties are due whether or not there is any tax at stake. There is a clear policy purpose to this which is to encourage taxpayers to submit returns and to submit them on time. This is particularly important in relation to the CIS as HMRC needs to be notified about payments which have been made to sub-contractors, even those with gross payment status, so that they can check the right person accounts for the right amount of tax at the right time.

112. Turning to the absolute amount of the penalty and whether this is disproportionate, I considered in my decision in *Gareth Beer v HMRC* [2017] UKFTT 0622 (TC) whether proportionality could be a special circumstance for the purposes of schedule 55. My conclusion [at 90] was that, on its own, this could not be the case. The reason for this is that Parliament has clearly provided for a scheme of penalties where there is a minimum penalty even where no tax is due and that it cannot therefore have intended that this fact on its own would be a special circumstance which would justify a reduction in the amount of the penalties.

113. HMRC in their written submissions in any event make the point that, over the six year period in question, the penalties are an average of just under £3,800 a year. In the context of a business with a turnover of around £1m a year and a profit margin of 15-20%, they say that the penalties are not, in any event, disproportionate. This

does of course depend on whether proportionality is determined by reference to turnover/profits or by reference to the amount of tax at stake. However, on either basis, I agree that this is not a special circumstance which would, by itself, justify a reduction in the amount of the penalties.

114. However, there is an additional feature here which is very similar to the situation in *Welland*. That case related to penalties under schedule 55 in respect of the late filing of returns which were due under the provisions relating to non-resident capital gains tax. Under that regime, a taxpayer has to submit a tax return within 30 days after the sale of a property. Mr Welland was unaware of this requirement. He sold three properties in one tax year and therefore was charged three separate penalties. The Tribunal concluded [at 137-138] that this amounted to special circumstances justifying a reduction in the amount of the penalties:

> "137. Taking into account the principles explained in *Warren*, I find that the circumstances are unusual but not unique. Can it be said it is significantly unfair for Mr Welland to bear the whole penalty? A taxpayer selling a single valuable property who failed to make the return would be penalised once; Mr Welland, selling three not so valuable properties, was penalised three times. And it is clear he did learn from his mistakes: he filed as soon as he realised his mistake and avoided the 12 months penalty on the last of the three sales.
>
> 138. I think that does amount to special circumstances, particularly in circumstances (which is not in dispute) where the taxpayer has previously had a good compliance record. Parliament, while intending to penalise non-compliance, must have intended taxpayers to learn from their non-compliance. Because of the three sales in quick succession, Mr Welland was unable to do so. I consider that the penalties should be reduced so that only the penalty on the first sale in the tax year 15/16 should be payable. In other words, I reduce the penalty to £700."

115. Mr Richards, not surprisingly, submits that the reasoning in *Welland* applies in this case on the basis that there was a single mistake which gave rise to multiple defaults and with no opportunity for the appellant to learn from its mistake.

116. HMRC make the point that *Welland* is not binding on the Tribunal but in any event say that the appellant's case can be distinguished from *Welland* on the facts.

117. As far as the appellant's case is concerned, HMRC draw attention to the following:

(1) The appellant filed other CIS returns throughout the period of default.

(2) Penalties accrued because the appellant failed to check its CIS position and this was not rectified until HMRC's enquiry identified the errors.

(3) The appellant is well-established and profitable with consistent profit margins and should therefore be expected to have knowledgeable staff

with responsibility for payroll/CIS compliance or to seek professional advice.

118. By comparison, HMRC point out that Mr Welland:

(1) was an individual obliged to file a non-resident capital gains tax return for the first time which was a new scheme.

(2) attempted to declare the gains on his self-assessment return and therefore knew he had a tax liability. I infer from this that the point HMRC are making is that Mr Welland did not get the law wrong but just the mechanics and did in fact make a return rather than the liability only being discovered as a result of an enquiry.

(3) was only likely to need to file a non-resident capital gains tax return a finite number of times as a result of the relevant property transactions. It was not expected that this was an ongoing obligation which, like a CIS return, would be required on a monthly basis.

119. HMRC also argue that there is no requirement for HMRC to remind the taxpayer of their obligations or point out any shortcomings, thereby educating them. This, they say, is left to the application of the penalty provisions. They suggest that the Tribunal should not consider whether it was fair to afford the appellant an opportunity for education.

120. In drawing these distinctions between the facts in *Welland* and those in this case HMRC are, in effect, looking at all of the circumstances of the case in deciding whether, as a result of special circumstances, it is right to reduce the amount of the penalties.

121. Although I have, in the preceding paragraphs, looked individually at a number of specific points put forward by Mr Richards, I have come to the conclusion that, rather than looking at each circumstance individually, the correct approach to considering whether it is right to reduce a penalty as a result of special circumstances is to consider all of the facts of the case and then to decide whether, taken as a whole, those facts constitute special circumstances which make it right to reduce the penalty in question.

122. Applying that approach, I have come to the conclusion that, in this case, despite the differences pointed out by HMRC when compared with the facts in *Welland*, the circumstances are sufficiently special to justify a reduction in the amount of the penalties.

123. In coming to this conclusion, I have had regard to the following:-

(1) There were multiple defaults leading to multiple penalties deriving from a single mistake;

(2) There was a genuine mistake. The Appellant did not intend to avoid its responsibilities;

(3) The Appellant has a good compliance record;

(4) The amount of the deductions which should have been made was minimal.

124. As mentioned above, the latter three points, on their own, do not constitute special circumstances. They are however part of the overall picture which make the circumstances as a whole sufficiently special to justify a reduction in the amount of the penalties.

125. I have considered HMRC's objection that they have no obligation to point out any shortcomings to a taxpayer or to afford any opportunity for education. I fully accept this but the complaint here is not whether HMRC could or should have done more to identify the error sooner but whether the Appellant had the opportunity to become aware of its mistake before incurring multiple penalties as a result of multiple defaults.

126. In coming to the conclusion that there are in this case special circumstances justifying a reduction in the amount of the penalties, I have also taken into account paragraph 13 of schedule 55 which limits the amount of penalties for failure to file CIS returns where a taxpayer has not previously filed a return. The limit applies not only in respect of the first return which is filed but also in respect of any other returns which should have been filed before the date on which the first return is filed. Other than any tax related penalties (which are not relevant in this case), the total aggregate amount of penalties which can be charged in respect of such returns may not exceed £3,000.

127. It is clear that Parliament's intention in enacting this provision was to ensure that a taxpayer who did not realise that they should be filing CIS returns and where there were no significant payments to be made to HMRC would still face a penalty but would not be subject to multiple monthly penalties which, as can be seen from this case, can very quickly run up to very significant amounts of money.

128. Although the appellant has regularly filed CIS returns, in substance, the appellant is in a similar situation to a business which would normally be able to benefit from the restriction in paragraph 13. The reason for this is that, as a result of the appellant's mistake, it did not realise that it had to file CIS returns in the particular circumstances in question. Whilst this does not, for the reasons set out above, constitute a reasonable excuse for the failure, the fact that it has given rise to multiple defaults and therefore multiple penalties, in my view, supports the conclusion that there are special circumstances which do justify a reduction in the amount of the penalties.

129. HMRC point out that everybody within the CIS regime has a statutory obligation to file a CIS return. Relying on the Tribunal's comment in *Collis* (see paragraph [91] above) that a special circumstance must operate on the particular person and not be a general circumstance that applies to many taxpayers, they submit that the fact that there are multiple failures cannot be a special circumstance.

130. I would agree that the mere failure to submit a CIS return on its own cannot be a special circumstance but it does not seem to me that it follows from this that multiple

failures giving rise to multiple penalties cannot, depending on the circumstances, be a special circumstance which would make it right to reduce the amount of the penalties

131. Where paragraph 13 of Schedule 55 applies, Parliament has determined that a total penalty of £3,000 is appropriate. Although the Appellant does not fall within paragraph 13 of Schedule 55, the circumstances are such that this provides a good guide as to the amount of the appropriate reduction of the penalties in this case.

132. As the appellant is already subject to a penalty of £3,000 under the previous penalty regime, it is in my view appropriate to reduce the penalties under schedule 55 to nil so that the total penalty payable by the appellant is £3,000 given that the entirety of the penalties all relate to the same original cause. There is in my view no reason for the aggregate amount of the penalties to exceed the figure suggested by Parliament just because some of them have been charged under a different penalty regime.

133. This is also in accordance with HMRC's policy of reducing any penalties under the old regime so as to align them with the schedule 55 regime.

Decision

134. The penalties have been properly charged in accordance with the relevant legislation.

135. The appellant does not have a reasonable excuse for its failure to file the CIS returns on time.

136. HMRC's decision that there are no special circumstances justifying a reduction in the amount of the penalties charged under schedule 55 is flawed.

137. There are special circumstances justifying a reduction in the amount of the schedule 55 penalties to nil.

138. The penalties charged under s 98A TMA totalling £3,000 are confirmed.

139. 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.

ROBIN VOS
TRIBUNAL JUDGE

RELEASE DATE: 18 DECEMBER 2018