[2015] UKFTT 0004 (TC)

TC04811

Appeal number:TC/2015/2580

Income Tax – CIS scheme – (i) whether persons paid were subcontractors, (ii) whether reasonable excuse, (iii) mitigation

FIRST-TIER TRIBUNAL
TAX CHAMBER

DAVID CROSSMAN **Appellant**

- and -

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

TRIBUNAL: JUDGE CHARLES HELLIER
DAVID BATTEN

Sitting in public in Exeter on 9 December 2015

The Appellant in person together with Mark Hazell of Sovereign Accountancy

Chris Cowan for the Respondents

DECISION

1. Mr Crossman appeals against:

(i) a determination that he is liable to pay tax of £7,688.00 under the Construction Industry Scheme (the "CIS Scheme");

(ii) a penalty assessment of £20,400 assessed under the provisions of s 98A(2) Taxes Management Act 1970 in relation to the failure to deliver monthly returns under the CIS Scheme from 5 June 2010 to 5 October 2011, and

(iii) a penalty assessment of £3,660.60 under Sch 55 FA 2009 in respect of his failure to deliver such returns in the period from 5 November 2011 to 5 April 2013.

2. Although the penalty assessment at (ii) above was for £20,400.00 Mrs Cowan explained, and undertook, that HMRC would mitigate the assessment if it was upheld to the amount which would have arisen under the provisions of Sch 55 FA 2009. This amount HMRC stated was £3,525.40. This would be the case even though Mr Crossman had at an earlier stage refused HMRC's offer so to do because he wished to pursue the issue before the tribunal. HMRC's practice in this regard seemed to us to be a proper and proportionate response.

The Evidence and our findings of Fact.

3. We had before us a bundle of copy correspondence between HMRC and Mr Crossman and his advisors, and we heard the oral evidence of Mr Crossman. Mrs Cowan showed us copies of invoices on HMRC's file. We were also given a letter from Mr Crossman's wife explaining the stress HMRC's investigation had caused Mr Crossman, and a letter from the General Manager of Stallcombe House, for whom Mr Crossman had done plumbing work, attesting to his integrity.

4. Mr Crossman told us he had dyslexia. It was apparent to us that, whilst an intelligent man, he was not well educated. He had difficulty in reading (he told us that he had a reading age of 10) and in adapting his thinking to the process of legal analysis.

5. Mr Crossman has been in business on his own account for many years as a bathroom fitter. He does this work in for property owners and does not work on building sites or for large concerns.

6. Mr Crossman does not charge a mark up on goods and materials he supplies to his customers as part of his work. He said that he regarded this as one of his selling points.

7. Between 2010 and 2013 Mr Crossman paid other people for construction work they had done at sites where he was working. These people had been introduced by Mr Crossman to the person for whom he was working. They invoiced Mr Crossman for the work they did and Mr Crossman received from the person for whom he was

working an equal sum (in the same way as he dealt with goods and materials). Mr Crossman received payment from the person for whom he was working. He made no mark up on the transactions.

8. The nature of the work done by these people and their relationship with Mr Crossman and with the bathroom on which Mr Crossman was working differed. We recount Mr Crossman's description of these matters, which we accept, in that part of the section headed Discussion below in which we consider whether or not they were subcontractors for the purposes of the CIS Scheme.

9. A VAT compliance investigation into Mr Crossman's business led to an income tax enquiry for 2010/11 and then for other years. After the provision of further information to Mr Folan of HMRC, HMRC accepted that Mr Crossman's return did not understate his income and indeed that a small tax repayment was due. But Mr Crossman was then passed on to Miss Brick of HMRC who dealt with the CIS Scheme because the declared expenses in his tax returns had included amounts paid to those people described in the preceding paragraph. This appears to have happened in January 2014.

10. Before the investigation into his tax returns started Mr Crossman had used a local accountant to prepare his tax returns; the practice had been bought by a firm of Chartered Accountants located in Sussex which he had continued to use. That firm, The Internet Chartered Accountants ("TICA"), had helped him at the start of the enquiry into his tax returns. However, they had been slow and unresponsive to HMRC's requests. A schedule prepared by Mr Folan of the correspondence between him and Mr Crossman and TICA between November 2012 and March 2014 showed the difficulties Mr Crossman and Mr Folan had had in getting TICA to send documents and information to HMRC

11. Mr Crossman changed accountants in March 2014 to Sovereign Accountancy, who helped him in relation to the investigation into his CIS Scheme liabilities.

12. TICA had not mentioned to Mr Crossman the possibility that he had obligations or should make return under the CIS scheme.

13. Mr Crossman said that before 2014 he was unaware of the CIS Scheme, and he told Miss Brick in a telephone call on 3 March 2014 that he had spoken to some other subcontractor friends who told him that they had not heard of the CIS Scheme. Although we were somewhat surprised that he had not heard of it from other building contractors whom he may have met, this evidence was not challenged by Mrs Cowan.

The Parties' submissions

14. Mr Hazell said that Mr Crossman had relied upon his previous accountant and had been let down. That accountant was a qualified Chartered Accountant regulated by the ICAEW. Mr Crossman had reasonably supposed that such a person would alert him to any duties he had under the CIS Scheme. That was reasonable excuse for any failure. Further Mr Crossman had not acted dishonestly and had cooperated and acted promptly to assist HMRC's investigations.

15. Mr Crossman's grounds of appeal also note that his annual net profits were modest (eg £14k for 2012) and that the information previously provided to HMRC showed how limited his assets are.

16. Mrs Cowan argued that Mr Crossman had no reasonable excuse for his failure to submit CIS returns. It was a statutory requirement and the failure of his accountant to provide the necessary advice did not excuse his failure; his remedy should be against his former accountants if they had been negligent.

Discussion

17. The construction industry scheme was introduced by Finance Act 2004. The primary legislation was supplemented by regulations (SI 2005/2045). The scheme provides for certain payments made by a "contractor" to "subcontractors" under a "construction contract" to be made under deduction of income tax, and for persons making those payments to make monthly payments and returns to HMRC.

18. As a result of the scheme Mr Crossman had to account to HMRC for tax on payments made by him which fell within the scheme, and make a monthly return of the payments he made. But the payments Mr Crossman made to the persons mentioned in paragraph [7] above (the "Paid Parties") fall within the scheme only if they were payments by a contractor to a subcontractor under a construction contract.

19. Section 57 FA 2004 defines "construction contract" and, in (2)(b), "contractor" :

> "(2) In this chapter "construction contract" means a contract relating to construction operations (see section 74) which is not a contract of employment but where -
>
> (a) one party to the contract is a subcontractor (see section 58); and
>
> (b) another party to the contract ("the contractor")…
>
> (ii) is a person to whom section 59 applies."

20. Section 59 includes:

> "(a) any person carrying on a business which includes construction operations".

21. Mr Crossman was clearly carrying on construction operations in the work he did on bathrooms. His business therefore included such operations and so he was a contractor. As a result any contract he had with a subcontractor which related to construction operations was a "construction contract" *unless* it was a contract of employment.

22. To the extent therefore that any of the people Mr Crossman paid were paid as his employees the CIS Scheme did not apply to them.

23. The distinctive feature of a contract of employment is that the employee agrees to render his personal service at the direction of the employer in return for payment.

24. One of the Paid Parties was Thomas Hughes. We relate the evidence in the table below in relation to his work. It was clear to us that he was engaged to provide his personal services to Mr Crossman as a labourer or apprentice, and worked under the control of Mr Crossman. He was an employee. In our judgement therefore payments to him fell outwith the ambit of the CIS Scheme.

25. Mr Crossman's evidence did not indicate that any of the other Paid Parties worked under his control. We concluded that they were not employees. Thus payment to them could fall within the CIS Scheme *if* they were subcontractors.

26. Section 58 defines subcontractor:

> "For the purposes of this Chapter a party to a contract relating to construction operations is a subcontractor if, under the contract-
>
> > (a) he is under a duty to the contractor to carry out the operations, or to furnish his own labour…or the labour of others in the carrying out of the operations or to arrange for the labour of others to be furnished in the carrying out of the operations; or
> >
> > (b) he is answerable to the contractor for the carrying out of the operations by others…"

27. The CIS scheme and the reporting obligations apply to payments made by Mr Crossman to any of the Paid Parties (other then Thomas Hughes) if they were subcontractors. Section 58 therefore raises two issues: (i) whether the Paid Parties were party to a contract with Mr Crossman at all, and (ii) if they were, whether they were under a duty under that contract to Mr Crossman to carry out (or to procure the carrying out of) the operations (para (b) above having no effect in the present circumstances).

28. The only evidence of the status of the relevant Paid Parties which HMRC had been given prior to the hearing of the appeal were copies of invoices from them to Mr Crossman and his accounts. Typically these invoices said: *x*hrs @ £*y* per hour = £*xy* or something very similar, and recounted the place of the activity. That suggested that the relevant Paid Parties were parties to contracts with Mr Crossman, and the fact that his accounts showed the payments as expenses of his business indicated that the Paid Parties had been under a duty to undertake construction operations for Mr Crossman. On the basis of that evidence it seems to us that HMRC's decision that they were subcontractors was quite reasonable.

29. We however had the benefit of further explanation and detail from Mr Crossman. He explained that at least in some cases these relationships had arisen because someone for whom he had been working had asked if he know someone who could do a particular job. Mr Crossman had recommended a Paid Party who had discussed the job with Mr Crossman's client and agreed terms. Mr Crossman's client had asked Mr Crossman if he could arrange a single payment through him for all the work, in the same way goods and material were paid for, and Mr Crossman had agreed.

30. Where that had been the case it seems to us that it was unlikely that a contract with reciprocal obligations existed between Mr Crossman and the Paid Party. Mr Crossman received the money from his client as trustee or agent for the Paid Party, not as a person obliged to render services or procure the rendering of services to the Client. The Paid Party was under a duty to the client to perform the works, but not under a duty to Mr Crossman to perform them. Either Mr Crossman contracted as agent for the Paid Party, or more likely he simply acted as banker.

31. In those circumstances the Paid Party would not be a subcontractor and the payment made did not fall within the CIS Scheme.

32. However, whilst we do not regard the deduction in Mr Crossman's accounts of the monies paid to the Paid Parties as strong evidence that these payment were really costs of Mr Crossman's business (because the accountant was a long way away, because Mr Crossman was not sophisticated, and because the way in which they were described in his accounts made no difference to the bottom line), the nature of the invoices given to Mr Crossman by the Paid Parties suggested a contractual relationship based on work done in operations for which Mr Crossman was primarily responsible and that the relevant Paid Parties were responsible to him.

33. Weighing all the evidence - the invoices and Mr Crossman's the description of the relationships and work done - we reach the following conclusions:

Name	**Activity etc**	**Subcontractor to a contractor?**
Flynn Mardell	Plumber. Undertook jobs for which Mr Crossman did not have time. Quoted directly to the client, invoiced Mr Crossman. Regularly engaged. Paid round sums in most months in 2011/12	Yes
Elliott Whatmore	Carpenter Did work for one of Mr Crossman's customers, Mr Desarme, with a big house. Replaced sash windows. Woodwork for garage. Agreed scope of work with, and quoted to Mr Desarme, invoiced Mr Crossman. Work paid for in October 2011 only.	No
Steve Carpenter	Bricklayer Adjusted a pillar on Mr Desarme's gate. Agreed	No

	job and price with Mr Desarme, invoiced Mr Crossman.	
Daniel Crossman	Mr Crossman's brother, Plasterer: did "dot and dab" work with plasterboard in bathrooms over which Mr Crossman would tile etc. In the early years Mr Crossman was not able to render or plaster although more recently he has acquired that skill. Also drove a digger to dig out Mr Desarme's front yard. Invoiced Mr Crossman. Paid in June 2011, April and July 2012	Yes
Thomas Hughes	Mr Crossman's wife's nephew. Taken on as a sort of apprentice. No expertise. Undertook such labouring and other work as Mr Crossman told him to do from time to time. Not particularly punctual, came to work for about 3hrs per day. Paid on most weeks between April and December 2012, £20 per day	Employee
Paul Reeves, PPR Plumbing	Gas plumber. Undertook boiler work on one occasion when Mr Crossman was doing a bathroom. Not involved in the bathroom work.	No
Fox Plumbing	2010/11	Yes (not proven not to be)
Paul Smith PRS painting	Painter. Paid only twice in 2011/12	Yes (not proven)
Rob Smith RLS	Painter 2010/11	Yes (not proven)

34. As a result we conclude that the CIS Scheme applied only to payments made by Mr Crossman to those Paid Parties nominated "Yes" in the third column above. Mr Crossman had obligations to deduct and account and to make returns in respect of payments to those persons accordingly.

The determination of the tax which should have been accounted for: Paragraphs 9 and 13 of the CIS Regulations.

35. It is not disputed that, to the extent that Mr Crossman was required to deduct tax from payments made to relevant Paid Parties, he did not.

36. Regulation 13 permits HMRC to make a determination of the amount a contractor is liable to pay and has not paid. Reg 13(5) makes the provisions of TMA 1970 applicable to such a determination as if it were an assessment to income tax. As noted earlier determinations were made by HMRC. It is under those parts of TMA so applied that the appeal against the determination in this appeal is brought.

37. Reg 13(5) provides that such a determination shall not include amount in relation to which to which a regulation 9(5) direction has been made.

38. Regulation 9 provides that if one of two conditions, A or B, is satisfied HMRC may direct that the excess of the tax which should have been deducted over that which was deducted in relation to a particular payment shall not be a liability of the contractor. Condition A is that the contractor satisfies an officer of HMRC that-

> "(a) he took reasonable care to comply with section 61of the Act [obligation to deduct] and these Regulations, and
>
> (b) that-
>
> (i) the failure to deduct the excess was due to an error made in good faith, or
>
> (ii) he held a genuine belief that section 61 of the Act did not apply to the payment"

39. Condition B relates to HMRC being satisfied that the recipient of the payment paid tax on it.

40. In this case HMRC did make such a direction in relation to certain of the Paid Parties on the basis that Condition B was satisfied. They calculated the tax which should have been deducted on payments to the Paid Parties as £11,858.00, but considered that £4,170.00 was deducible from that sum as a result of the satisfaction of Condition B in relation to some of those parties. The result was that the amount of the determination against which the appeal is made (see para 1 above) is £7,688.00, (=£11,858.00 - £4,170.00).

41. The Taxes Acts do not provide for an appeal against a decision of HMRC that a particular amount is or is not to be deducted in the liability determination as a result of the operation of Condition B. Mr Crossman told us that he has recently found new information about he UTR references of some of the Paid Parties, and suggested that

this information should enable HMRC further to increase the Condition B deduction from the amount determined.

42. It may be that such is the case, and it would seem fair for HMRC to look at this new information, but we have no jurisdiction to consider the issue.

43. In relation to Condition A the regulations provide that if an officer concludes that the condition is not met he or she may issue a "refusal notices". The regulations then provide for a right of appeal against such a refusal notice.

44. It is an oddity of the Regulations that they do not expressly provide for the contractor to apply for a direction that Condition A is satisfied, and do not compel HMRC to issue a refusal notice (against which an appeal may be made)

45. In a letter to HMRC and the tribunal of 24 November 2015 Mr Hazell said that Mr Crossman was relying on Regulation 9(3) [Condition A] and 9(4) [Condition B]. Thus it seems to us that whatever claim as was necessary to bring Condition A into play had been made.

46. But, as Mrs Cowan said, HMRC had not given a refusal notice and as a result an appeal could not be brought at this stage. She said that HMRC would invite an application under Condition A.

47. The progress of the investigation had clearly caused Mr Crossman much grief and he did not wish to prolong the issues any longer. He therefore was averse to anything which might extend the agony. We hope that if we give our view on the issue it may help.

48. In our view Mr Crossman would not succeed in an appeal against a refusal under Condition A. Whilst it is clear to us that taking reasonable care to apply section 61 can include erroneously not applying it (otherwise reg 9(3)(b)(ii) would make no sense), the Condition seems to be directed at the situation where the contractor is aware of the provision of the CIS Scheme, has given thought to its application and has come genuinely to the conclusion that tax is not deductible or made an error in relation to its application in good faith. Thus it would not apply in Mr Crossman's position where, because he did not know about the scheme he could not have given it thought. That is unless his old accountant had, on his behalf, given it such thought and concluded that it did not apply, but we had no evidence to suggest that such was the case. As a result we would find that if a refusal notice had been given or is to be treated as having been given, an appeal against it would not succeed.

49. Thus it seems to us that, subject to any adjustments arising as a result of (a) our decisions in relation to which of the Paid Parties was and was not a subcontractor, and (b) any amendment HMRC might choose to make as a result of the further information provided by Mr Crossman about others of the Paid Parties, the amount set by the determinations is due.

Penalties under section 98A: 5 June 2010 to 5 October 2011

50. In this period regulation 4 provided that section 98A TMA applied to the requirements to provide a CIS return.

51. Section 98A TMA provides relevantly as follows:

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

(a) to a penalty or penalties of the relevant monthly amount each month (or part of a month) during which the failure continues ...

(b) if the failure continues beyond 12 months, without prejudice to any penalty under paragraph (a) above, to a penalty not exceeding…(ii) in the case of a provision of regulations made under section 70(1)(a) or 71 [FA]2004, £3000."

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

(a) where the number of persons in respect of whom particulars should be included in the return is 50 or less, £100 ..."

52. The penalties of £20,400 were assessed on this basis. If returns were due to be made, the calculation of the penalty was not disputed. It is unaffected by our conclusions on which of the Paid Parties were subcontractors since it appears that at least some of them were in each relevant period.

53. Section 118(2) TMA provides:"(2) ... where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse ceased."

54. Mrs Cowan drew out attention to the tribunal's decision in *Bushell v HMRC [2010] UKFTT 577(TC)* where the tribunal said:

51. We note that, unlike section 59 VATA, there is no express restriction on the ambit of reasonable excuse which excludes therefrom the reliance on another person to perform a task.

52. In *Roland v HMRC* 2006 STC SC D 536, the Special Commissioner held that in the context of section 118(2) TMA, reliance on a third party could give rise to a reasonable excuse. In *Roland* the taxpayer had relied on apparently incorrect advice from her accountants in relation to a complex field of taxation. The Special Commissioner found that it was sensible and reasonable for her so to do, and that she had a reasonable excuse.

53. In *Huntley Solutions Ltd* 2009 UK FTT 329 (TC) the appellant relied upon an agent to provide fairly straightforward information and documents to HMRC. The agent failed to provide those documents through a combination of overwork and personnel difficulties. The tribunal sought written submissions from the

parties as to whether the reliance on a third-party could be a reasonable excuse. In those submissions both parties (including HMRC) accepted that reliance on the third party could amount to a reasonable excuse for direct tax purposes (paragraph [25]).

54. The tribunal in *Huntley Solutions* agreed that reliance on another could provide a reasonable excuse ([32]), but accepted the submission from HMRC that regard should be had to the nature of the task. It found the information required of the taxpayer straightforward and easily understood, and that accordingly it was not reasonable for the appellant to rely on the agents when it should have been able to comply itself [34], and that therefore the appellant did not have a reasonable excuse.

55. In *Jeffers* TC0337, the President, Sir Stephen Oliver, held that reasonable reliance on accountants did not constitute a reasonable excuse in the absence of any underlying cause. He said:

> *"17. The Code (i.e. Part X of TMA) does not qualify the expression "reasonable excuse" by, for example, ruling out reliance on another to perform a task such as making a tax return. The obligation to make the tax return on time is nonetheless the taxpayer's. It remains his obligation regardless of the fact that he may have delegated the task of making the return to his agent. There may be circumstances in which the taxpayer's failure, through his agent, to comply with, e.g, the obligation to make the return on time can amount to a "reasonable excuse". To be such a circumstance it must be something outside the control of the taxpayer and his agent or something that could not reasonably have been foreseen. It must be something exceptional."*

56. It seems to us that reliance on an agent may be an excuse or a reason for non compliance, but such reliance is normal and customary, and the statute cannot have intended such reliance to constitute a *reasonable* excuse in every case. It seems to us that it cannot be the intention of legislation to permit the reliance on a competent person who fails unreasonably to fulfil the task with which he is entrusted to absolve the principal in all cases.

57. We concur with the President when he said that to be a reasonable excuse the excuse must be something exceptional. In our view, in determining whether or not that is the case it may be necessary to consider why the agent failed (and thereby to regard the agent as an arm of the taxpayer). To give a simple example, if a return was given to someone to post, and that person failed to do so, the reasons for that failure will illuminate whether or not there is a reasonable excuse: if the messenger was run over by a bus the position will be different from the case where the messenger merely forgot.

55. *Bushell* and *Jeffers* both concerned the situation in which an agent was appointed to deal with the making of returns and had failed to make them on time. The question was whether reliance could be placed on an agent so appointed could be a reasonable excuse. The issue in the current appeal is whether a reasonable excuse

arises because an agent did not advise that returns would be due. It is not the failure of the agent to take the necessary action which is relied upon but the deficient advice of the agent.

56. What is reasonable for one person may be different from what is reasonable for another. The circumstances of the individual matter. HMRC's Manual puts this succinctly when it says at CH61600:

> "What is or is not a reasonable excuse is personal to the individual's abilities and circumstances. Those abilities and circumstances may mean that what is a reasonable excuse for one person may not be a reasonable excuse for another"

57. Mr Crossman was not an educated man and had difficulties reading. We accept that these circumstances may have provided a reasonable excuse for getting something wrong, but the essence of this appeal is not that Mr Crossman got something wrong, but that he did not know what the law required. It is an age old maxim that ignorance of the law is no excuse, and although we consider that there may be exceptional circumstances where this maxim might not apply (for example in some circumstances to a child or a person in a coma), and would not regard Mr Crossman as blameworthy, we do not regard Mr Crossman's circumstances as being exceptional.

58. As a result we find that there was no reasonable excuse for the failure.

Penalties under Sch 55: 5 November 2011 to 5 April 2013.

59. After 6 October 2011 the penalty regime in paras 7 to 13 Sch 55 applied. This set different amounts of penalties for late delivery of CIS returns. There is a fixed £100 penalty under para 8 for the failure to make the return, a further penalty of £200 under para 9 if the return is more than 2 months late and further penalties in para 10 and 11 if the return is respectively more than 6 and 12 month late. These latter penalties are limited to £300 or 5% of the tax liability where the failure was not deliberate.

60. Paragraph 13 provides that the £300 figure is to be ignored and for a £3,000 cap on the penalties under paras 8 and 9 where a number of returns have not been made and the contractor then makes his first return.

61. It appeared that, subject to the adjustments to be made in respect of the tax liability by reason of our conclusions about the Paid Parties who were not subcontractors, HMRC correctly calculated the penalties under these provisions.

Special Circumstances

62. Para 16 Sch 55 permits HMRC to reduce the penalty if the are special circumstances. Para 22 Sch 55 permits the tribunal to take special circumstances into account only if HMRC's decision in relation to them is "flawed". A decision is flawed for these purposes if it takes into account irrelevant matters, fails to take into account relevant matters, contains a material error of law, or is a decision which no reasonable

decision maker could have made. This may include a failure to consider the exercise of the discretion at all. Where a decision is 'flawed' the tribunal may substitute its own decision for that of HMRC.

63. Mrs Cowan told us that HMRC had considered this provision but concluded that there were not special circumstances. We did not have the opportunity to review the matters which had and had not been taken into account in this decision since the issue had not been raised by Mr Hazell.

Reasonable Excuse

64. Para 23 removes liability for a penalty if there is a reasonable excuse for the particular failure, but provides that

> "where [the contractor] relies on another person to do anything, that is not a reasonable excuse unless [the contractor] took reasonable care to avoid the failure."

65. That provision indicates that for the purpose of this provision reliance on another person may constitute a reasonable excuse, but this appeal was not a case in which the contractor had relied upon TICA to do something, it was a case in which, at best, the contractor had relied on the accountant to tell him that he needed to fulfil a statutory obligation. If Mr Crossman had expressly instructed his accountant to undertake all reporting obligations, then, given that the accountant appeared to be properly qualified, that would have been reasonable care to avoid failure, but there was not evidence that the accountant was so instructed; Mr Crossman instead relied upon the accountant to tell him of his obligations, and unless that reliance was made explicit or was clearly implicit in their relationship (and it was not suggested to us that it was) it is difficult to say that Mr Crossman took reasonable care to avoid any failure to comply with his statutory duties.

66. We conclude that para 23 does not apply to afford Mr Crossman relief form liability to the penalties.

Mitigation

67. Section102 TMA provides that HMRC may mitigate any penalty. The tribunal has no power to review or adjust the mitigation that HMRC applies, but there are two points we wish to suggest that HMRC bears in mind in addition to any consideration of Mr Crossman's means. They relate to the mitigation HMRC have undertaken to apply to the section 98A penalties by reducing them to the amount which would have been charged under the Sch 55 regime.

68. First, we note that the effect of para 13 sch55 is to limit the aggregate para 8 and 9 penalties to £3,000. Had Sch 55 been in force from June 2010 this would have affected the first fixed (para 8 and 9) penalties arising *both* after 1 November 11 and before that date. We did not see the calculation of the £3,525.40 to which HMRC proposed to mitigate the pre November 2011 penalties but think it likely that it included a reduction of the first fixed penalties to £3,000. If that is right then the

£3,000 was effectively charged twice: once for the period before November 2011 and once for the period after that date. If that is right then the spirit of the mitigation reduction may have been forgotten, and HMRC may wish to consider reducing the mitigated amount by a further £3,000.

69. Second, the conclusion we have reached in relation to whether or not the Paid Parties were subcontractors may affect the amount of the penalty which would have arisen under Sch 55, and thus reduce the mitigated amount.

Conclusions

70. The determination must be adjusted to reflect our findings in relation to the Paid Parties. Formally we adjourn the hearing for the parties to agree new figures. The parties may apply to the tribunal for a reconvened hearing if they cannot agree.

71. Subject to similar adjustment, and right to apply to the tribunal if the calculation cannot be agreed, we dismiss the appeal against the penalties.

72. We note HMRC's undertaking to mitigate the penalties and refer to our comments in relation to mitigation.

Rights of Appeal

73. 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.

CHARLES HELLIER

TRIBUNAL JUDGE
RELEASE DATE: 4 JANUARY 2016