[2020] UKFTT 0034 (TC)

TC07540

CORPORATION TAX – penalties under Schedule 46 to the Finance Act 2009 - failure to notify the name of the Senior Accounting Officer ('SAO') – failure to provide an SAO certificate – statutory construction – assessment to penalties by discretion – no jurisdiction to consider 'fettering of discretion' or 'proportionality' – whether reasonable excuse – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal numbers: TC/2018/00789
TC/2018/01189

BETWEEN

CASTLELAW (NO. 628) LIMITED

IRENE DOUGLAS **Appellants**

-and-

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

TRIBUNAL: JUDGE HEIDI POON
IAN MALCOLM

Sitting in public at Caledonian House, Dundee on 19 July 2019

Mr Philip Simpson QC, instructed by Henderson Loggie LLP, for the Appellants

Mr Gary Cruddas, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

Introduction

1. These are conjoined appeals by Castlelaw (No. 628) Limited ('Castlelaw' or 'the Company') and Mrs Irene Douglas ('Mrs Douglas') against penalties imposed under Schedule 46 to the Finance Act 2009 ('Sch 46 FA 2009').

2. The penalty assessed on the Company is under para 7 of Sch 46 ('para 7 penalty') and is in respect of a failure to notify the respondents ('HMRC') the name of its Senior Accounting Officer ('SAO') for the accounting period ended 31 March 2016.

3. The penalty assessed on Mrs Douglas is under para 5 of Sch 46 ('para 5 penalty') and is in respect of her failure as the Company's SAO to provide an SAO certificate for Castlelaw for the accounting period ended 31 March 2016.

4. The issues for determination in these appeals are:

(1) whether the penalties have been correctly assessed according to the terms of the legislation; and

(2) if so, whether the appellants had a reasonable excuse for the failures.

Evidence

5. HMRC Officer David Grzymek of the 'Large Business Customer Directorate' gave evidence for the respondents as the caseworker in relation to the penalties under appeal. We accept Officer Grzymek's evidence as to matters of fact, which is corroborated by the documents lodged.

6. Mrs Douglas holds the position of the Company Secretary of DC Thomson and Company Limited ('DC Thomson' or 'the group'), and was the SAO of Castlelaw at the material time. We find Mrs Douglas to be honest and straightforward, and accept the truthfulness of her understanding of the SAO regime, and of the explanations given concerning the failures.

Relevant legislation

7. Schedule 46 to FA 2009 is under the heading of 'Duties of Senior Accounting Officers of Qualifying Companies' ('the SAO regime'), which provides as follows.

(1) Paragraph 1 provides that the SAO of a qualifying company 'must take reasonable steps to ensure that the company establishes and maintains appropriate tax accounting arrangements' by: (a) monitoring the accounting arrangements of the company, and (b) identifying any respects in which those arrangements are not appropriate.

(2) Paragraph 2 requires a 'Certificate for Commissioners' to be provided:

> '(1) The senior accounting officer of a qualifying company must provide the Commissioners with a certificate for each financial year of the company.
>
> (2) The certificate must –
>
> (a) state whether the company had appropriate tax accounting arrangements throughout the financial year, and
>
> (b) if it did not, give an explanation of the respects in which the accounting arrangements of the company were not appropriate tax accounting arrangements.

(3) The certificate must be provided –

(a) by such means and in such form as is reasonably specified by an officer of Revenue and Customs, and

(b) not later than the end of the period for filing the company's accounts for the financial year (or such later time as an officer of Revenue and Customs may have allowed).

(4) A certificate may relate to more than one qualifying company.'

(3) Paragraph 3 sets out the requirement for a qualifying company to notify the Commissioners of the name of the SAO for each financial year, and under sub-paras (2) and (3), it is stated that:

'(2) The notification must be given –

(a) by such means and in such form as is reasonably specified by an officer of Revenue and Customs, and

(b) not later than the end of the period for filing the company's accounts for the financial year (or such later time as an officer of Revenue and Customs may have allowed for providing the certificate for the financial year under paragraph 2).

(3) A notification may relate to more than one qualifying company.'

(4) Paragraph 4 provides for the assessment of a penalty of £5,000 on the SAO for failure to comply with the main duty under para 1 at any time in a financial year.

(5) Paragraph 5 provides for a penalty to be assessed on an SAO for failure to provide a relevant certificate as follows:

'(1) This paragraph applies if a senior accounting officer –

(a) fails to provide a certificate in accordance with paragraph 2, or

(b) provides a certificate in accordance with that paragraph that contains a careless or deliberate inaccuracy.

(2) The senior accounting officer is liable to a penalty of £5,000.

(3) For the purposes of this Schedule, an inaccuracy is careless if the inaccuracy is due to a failure by the senior accounting officer to take reasonable care.

(4) An inaccuracy in a certificate that was neither careless nor deliberate when the certificate was given is to be treated as careless if the senior accounting officer –

(a) discovered the inaccuracy some time later, and

(b) did not take reasonable steps to inform HMRC.

(6) Paragraph 6 applies where the identity of the senior accounting officer of a company changes.

(7) Paragraph 7 provides for a penalty to be assessed on a qualifying company:

'A qualifying company is liable to a penalty of £5,000 if, for a financial year, the Commissioners are not notified of the name or names of its senior accounting officer or officers in accordance with paragraph 3.'

(8) Paragraph 8 provides for the defence of 'Reasonable excuse' against a penalty:

'(1) Liability to a penalty for a failure to comply with this Schedule does not arise if the senior accounting officer or qualifying company satisfies HMRC or

(on an appeal notified to the tribunal) the tribunal that there is a reasonable excuse for the failure.

(2) For the purpose of this paragraph –

(a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside the person's control,

(b) where the person relies on any other person to do anything, that is not a reasonable excuse unless the first person took reasonable care to avoid the failure, and

(c) where the person had a reasonable excuse for the failure but the excuse has ceased, the person is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excused ceased.'

(9) Paragraph 9 provides for the assessment of penalties as follows:

'(1) Where a senior accounting officer or a qualifying company becomes liable for a penalty under this Schedule –

(a) HMRC *may* assess the penalty, and

(b) if they do so, they *must* notify the officer or company liable for the penalty.' (italics added)

(2) Sub-paragraph 9(2) provides for the time limits for an assessment of a penalty to be: (i) within 6 months after the failure or inaccuracy first comes to the attention of an HMRC officer; (ii) within 6 years after the end of the period for filing the company's accounts for the financial year.

(3) Sub-paragraph 9(3) is a capping provision against an SAO being assessed as liable to a penalty under para 4 or 5 for a company ('C') in a financial year if the SAO has already been assessed as liable to a penalty for another company within the same group as 'C'.

(4) Sub-paragraph 9(4) is a capping provision against assessing a company ('C') to a penalty under para 7 for a financial year if C was a member of a group at the end of that year and HMRC has assessed another company in the same group as C to a para 7 penalty.

(10) Paragraph 10 provides for the right of appeal, whereby:

'(1) A person may appeal against a decision of HMRC that a penalty is payable by that person.

(2) Notice of appeal must be given –

(a) in writing,

(b) before the end of the period of 30 days beginning with the date on which the notification under paragraph 9 [on assessment of penalties] was issued, and

(c) to HMRC.

(3) Notice of an appeal must state the grounds of appeal.

(4) On an appeal that is notified to the tribunal, the tribunal may confirm or cancel the decision.'

8. In relation to the quantification of a penalty under paras 4, 5 and 7, the quantum is fixed at £5,000, to be enforceable within 30 days from the date of notification of the penalty (para 11). The power to change the amount of penalties is reserved to the Treasury (para 12).

9. The following terms are defined by the statute under the relevant paragraphs as follows:

(1) Paragraph 14 defines 'appropriate tax accounting arrangements' to include 'keeping accounting records', and to mean 'accounting arrangements that enable the company's relevant liabilities to be calculated accurately in all material respects'. Relevant liabilities include taxes such as corporation tax, VAT, PAYE, insurance premium tax, stamp taxes, customs and excise duties.

(2) Paragraph 15 defines a 'qualifying company' as one with a 'relevant turnover' of more than £200 million, and a balance sheet total of more than £2 billion. Where a company was a member of a group, the 'relevant turnover' and the 'relevant balance sheet total' mean the aggregate turnover and balance sheet total of all group members.

(3) Paragraph 16 defines a 'senior accounting officer' as 'the director or officer who, in the company's reasonable opinion, has overall responsibility for the company's financial accounting arrangements'. In relation to a company that is a member of a group, sub-para (2) defines the SAO as 'the group director or officer who, in the company's reasonable opinion, has overall responsibility for the company's financial accounting arrangements'.

The Facts

Background

10. Castlelaw is one of the near 100 group companies of DC Thomson. The main business of the group is in publishing, which includes newspapers, books, and children's magazines, but has also diversified interests in radio and television media, and digital technology such as the global genealogy company 'Findmypast'. Notwithstanding its global reach as a leading publisher and media organisation, DC Thomson remains an unquoted private company.

11. Mrs Douglas joined the group in May 1987, initially working with William Thomson & Sons before transferring to the finance team of DC Thomson. She was appointed Head of Finance in 2010, and became Group Company Secretary in 2011.

12. The SAO regime was introduced by FA 2009, and applies to financial years beginning on or after 21 July 2009 (the date of Royal Assent). The DC Thomson group has been in the SAO regime since its introduction.

13. The accounting period end ('APE') of the group is 31 March. The SAO regime compliance date for the group is 31 December as provided under paras 2 and 3 of Sch 46, being nine months after the relevant APE in line with the accounts filing date with Companies House.

14. The group's first relevant accounting period for the SAO regime was in relation to APE 31 March 2011. For the periods concerned in this appeal, the group's turnover for APE 2015 was £244,482,000, which meant it remained in the SAO regime for 2016, and for APE 2016, the group's turnover was £275,372,000, and it remained in the SAO regime for 2017.

Customer relationship manager for the SAO regime

15. A customer relationship manager ('CRM') from HMRC is assigned to the group as the liaison officer for the SAO regime. On 9 February 2011, the then CRM gave a presentation to DC Thomson to introduce the SAO regime, and described the purpose of the CRM as being 'part of understanding the risks inherent in the business', through the means of 'Dialogue – openness and transparency', and 'Proportionate response'.

16. From the presentation slides, HMRC described the CRM as the person who will:

> 'Receive the certificate and notification
>
> Where necessary discuss issues raised with the company – additional information to assist customer understanding
>
> Be the first point of contact for support – (i) whether company/group is qualifying; and (ii) what are reasonable steps
>
> Be responsible for issuing penalties'

17. Referring to what she had understood from the CRM's presentation in 2011, Mrs Douglas said that there would be 'dialogue with CRM' and the SAO regime 'would not be about generating revenue through penalties or generating unnecessary admin'. Furthermore:

> '[The SAO regime] very much focused on a collaborative process and working with businesses. … From HMRC's perspective the focus would be on significant risk areas not about small insignificant amounts.'

18. The following excerpts from the CRM's 2011 presentation slides would seem to inform Mrs Douglas' understanding as stated in her witness statement; (emphasis all original):

(1) Duties of the SAO – 'SAO must take **reasonable steps** to ensure that the company establishes and maintains **appropriate tax accounting arrangements**.'

(2) 'Reasonable Steps' –

(a) Common sense approach: What would a person in the particular situation normally be expected to do to ensure that the risks to tax compliance are properly managed?

(b) Focus on key risks.

(c) No single definition:

(i) Will vary with circumstances; e.g. significance of liability will impact on what are reasonable steps in relation to individual regimes;

(ii) Will vary across taxes and duties (example in guidance);

(iii) Open discussion with HMRC of a company's tax accounting arrangements will contribute to reasonable steps.

(3) 'Appropriate Tax Accounting Arrangements' –

(a) Framework of responsibilities, policies, appropriate people and procedure in place for managing tax compliance risk.

(b) Systems and processes which put this framework into practice.

(c) End to end process from data input to arriving at the numbers which form the basis for completion of the tax return.

(d) Appropriate – depends on the business:

(i) Proportionate – no requirement to be 'penny perfect';

(ii) Errors don't automatically mean failure – discovery and disclosure can be evidence of effective monitoring arrangements;

(iii) No standard of evidence – what is reasonable and proportionate in line with the particular circumstances – doesn't have to be written in all situations.

(4) Outsourcing – 'Where functions are outsourced to third parties reasonable steps will include making an assessment of whether the third party is: (a) suitably competent; (b) suitably qualified; and (c) suitably controlled.

(5) 'Calculated accurately in all material respects' –

(a) 'Appropriate tax accounting arrangements' means accounting arrangements that enable the company's relevant liabilities to be calculated accurately in all **material respects**.

(b) This **does not** introduce accountancy materiality into tax.

(c) Focus on significance of transaction, system or tax and the relative size of these items in terms of the business.

(6) Penalties –

(a) The purpose of the legislation is NOT to raise compliance yield through the assessment of penalties.

(b) Liability to penalty will not arise if:

(i) Reasonable excuse subject to 'normal' provisions;

(ii) Put right the failure without unreasonable delay after the excuse ends.

(c) How do HMRC see this working?

(i) The focus should be on key / significant risk areas – not about small insignificant amounts (so common sense);

(ii) Relationship and dialogue with the CRM key;

(iii) It is not about generating revenue through penalties;

(iv) Not about generating unnecessary admin/bureaucracy.

(7) Interaction with risk –

(a) The SAO certificate should generally be taken at face value for the purposes of the Business Risk Review.

(b) Where a Business Risk Review needs to be conducted before the certificate is due CRMs may want to discuss the likelihood of a submission of a clean certificate to inform their assessment of Governance & Delivery.

(c) CRMs should be prepared to enter into dialogue with customers on the quality of tax accounting arrangements: –

(i) Open and transparent dialogue about systems and governance.

(ii) Collaborative not combative

(iii) Tax gap closure through voluntary compliance as a result of improvements in governance and systems.

(iv) No agreed standard of evidence – we do not want to create unnecessary or disproportionate administrative burden on businesses.

(v) What is appropriate, reasonable and proportionate – not looking for gold standard.

19. Mrs Douglas stated that in 2011, 'there was regular contact with the then CRM Eleanor Anderson'. In recent years, however, 'the contact has reduced and there have been several personnel changes to the CRM role'. In 2016 alone, the CRM changed twice. The new CRM, Craig Clark introduced himself in an email dated 7 November 2016 as follows:

'Dear Irene,

> I'm sorry that it has taken me so long to get in touch since taking over from Tracy Brook as HMRC CRM for DC Thompson [sic] & Co Ltd in September. Suffice for me to stay that I very much look forward to continuing the open and collaborative working relationship which Tracy (and her predecessor Eleanor MacLeod)[1] enjoyed in their dealing with the group. The Business Risk Review meeting on 6 December will give us an opportunity to review developments within the group/HMRC over the past 12 months and to discuss any current/future areas of taxation which may be causing concern….'

The Business Risk Review meeting in December 2016

20. The Business Risk Review meeting on 6 December 2016 at DC Thomson's premises in Dundee was attended by Craig Clark and three other HMRC officers, Mrs Douglas for DC Thomson, along with three representatives from Henderson Loggie.

21. In advance of the review meeting, a Group Organisation Chart ('GOC') was sent for receipt by a different HMRC officer on 24 October 2016. This GOC showed the group structure 'as at 30 September 2016' ('the GOC in question'). Castlelaw did not appear on this GOC.

22. The internal notes of the meeting by DC Thomas recorded the issues being discussed under the headings of the meeting agenda, with a list of action points under each heading. For example, no fewer than 33 issues were discussed in relation to the Specialist Review on VAT, and included the ongoing litigation of 'Findmypast'[2]. There were 10 action points for VAT matters alone, and they related to issues such as the VAT treatment of redundancy legal expenses, the apportionment of newspaper sale between paper and (free) website subscription, and the VAT position of various properties owned or leased by the group.

23. By email dated 23 January 2017, Officer Clark wrote to Mrs Douglas to provide a 'Summary' of the issues discussed in the December Risk Review meeting. The 15-page long document covered a wide range of issues from VAT to employment taxes, from 'risk assessment' of governance and accounting policies to 'risk ratings' of organisational behaviour and contribution factors. The following aspects of HMRC's Summary of the review are of note; (instances of letter capitalisation below are original):

(1) 'Behavioural risk: Existing risk register – no tax risks, governance review may identify specific tax risks – LOW';

(2) 'Contribution factors: Delivery – right tax, right time, No concerns – LOW';

(3) Under 'Inherent Risk', it is stated in the summary that:

> 'Complexity – the potential for risk in the size, scope and depth of the business interests (rating = Moderate) – [CRM's] comments:
> - fairly complex group structure / numerous entities (including dormants)
> - some complex tax issues e.g. VAT liability of on-line services
> - 8 PAYE refs / x VAT registrations'

24. In the January 2017 email attaching the Summary, Officer Clark asked Mrs Douglas to confirm whether the following entities should appear on the GOC provided to HMRC in

[1] It is unclear whether Eleanor MacLeod was Eleanor Anderson (née) referred to by Mrs Douglas in her witness statement, or whether they were two different CRMs with the same first name.

[2] On 8 September 2017, the Court of Session heard HMRC's appeal against the Upper Tribunal decision dated 21 January 2016: *Findmypast Limited v HMRC* [2016] UKUT 17 (TCC). The appeal concerned the VAT treatment of face-value vouchers to access the Findmypast website, and the effect on VAT upon their expiry without being used. The Inner House decision refused HMRC's appeal: *Findmypast Limited v HMRC* [2017] CSIH 59.

October 2016. This email was forwarded to Henderson Loggie on 27 January 2017 for a response; (see §44). The 'missing' entities noted by Officer Clark are the following:

(1) Thomson Magazines Ltd
(2) Castlelaw (no. 628) Ltd
(3) Golfing Scotland Ltd
(4) DC Thomson (Energy) Ltd

The Group Organisation Chart

25. In relation to the GOC in general, Mrs Douglas stated as follows:

(1) The GOC forms the basis for the preparation of the notification and certificate documents for the relevant companies for SAO purposes.

(2) The chart is used by the auditors as an instrumental part of the audit to ensure all relevant entities are audited and efficiently administered.

(3) The GOC was originally created in 2000 when the group had under 10 entities. By 2016, there were close to 100 entities in the GOC.

(4) Mrs Douglas is responsible for maintaining GOC, which is reviewed throughout the year in conjunction with Henderson Loggie, with a view to striking off inactive entities. Genes Reunited Ltd and Brightsolid Online Entertainment Ltd were applied to be struck off in March 2015.

(5) Mrs Douglas is the SAO of circa 33 companies; four other SAOs are responsible for circa 26 companies; there are five SAOs in all.

(6) There are around 20 dormant companies which have very limited accounting and no tax compliance administration requirements, and no corporation tax returns are required to be filed for them.

(7) A number of overseas incorporated entities are outside the SAO regime, and are not included in the GOC. There are further dormant entities (other than the 20 dormant companies noted above) which are not in the SAO regime, and are not on the GOC either (see §30(7) below).

26. The GOC dated 30 September 2016 shows 96 entities being listed under DC Thomson. This is the version sent to HMRC in October 2016, and the version upon which the submission for SAO notifications and certificates was based. Castlelaw is missing from this GOC.

27. The GOC in question was amended by adding the four companies back, and was provided to HMRC on 5 April 2017. The amended GOC still stated it was 'as at 30 September 2016' and shows 100 subsidiary entities. The hierarchy of the entities, excluding DC Thomson at the apex, consists of seven tiers. Castlelaw is shown as a wholly owned subsidiary of Taytel Limited ('Taytel'), which is listed as the eighth company of the first-tier group companies, counting from the left-hand side of the chart. Taytel is sandwiched between John Leng & Company Limited (in the sixth place) with its 4 subsidiaries, and Brightsolid Online Innovation (in the tenth place) with its 6 subsidiaries.

28. While Castlelaw is a second-tier subsidiary, (on the same level as the 4 subsidiaries of John Leng & Co, and the 6 subsidiaries of Brightsolid Online Innovation), due to the block of 10 subsidiaries neighbouring Castlelaw, in the amended version of GOC, Castlelaw is positioned below Taytel and above the first of the six subsidiaries of Brightsolid.

29. In relation to the GOC in question, Mrs Douglas acknowledged that:

> 'The chart is used throughout the year for various purposes and it is my belief that in preparing the chart for SAO purposes I inadvertently omitted Castlelaw.'

30. Mrs Douglas gave her reasons why Castlelaw came to be omitted 'inadvertently':

(1) 'Castlelaw 628 has never been an "active" entity for corporation tax' due to its sole purpose being that of holding a passive investment, and there had only been one accounting entry since the Company's incorporation on 15 February 2006.

(2) 'Any impairment on the value of that investment is considered at Group level. Due to the large number of entities included on the chart this omission was not picked up by myself or Henderson Loggie prior to lodging.'

(3) At the meeting with HMRC in December 2016, 'Craig Clark said that HMRC were sympathetic to the onerous compliance procedures that SAO brought to a relatively small unquoted family Group' and that HMRC would work with the Group to meet the SAO requirements.

(4) In cross-examination, Mrs Douglas described Castlelaw as having 'one passive investment'; 'no bank account'; 'no tax profile'.

(5) When asked how Castlelaw was 'inadvertently' taken off the organisational chart, Mrs Douglas said 'the group is quite dynamic'; that she was adding another company and was moving Castlelaw 'further on' in the chart; but it was 'taken off inadvertently'.

(6) When asked how many changes in 2016 in relation to the GOC, Mrs Douglas said she could not recall, but there were '10 to 20 changes every year in the five years' since the SAO reporting came into force.

(7) The group organisational structure is further complicated by dormant entities which are not included in the SAO regime, as illustrated by three organisational charts containing just the dormant companies within the group as at 'Year ended 31 March 2016'. Many of these dormant entities are either a holding company or a 'SPV', which stands for 'Special Purpose Vehicle', including a Taytel Limited SPV. There are 24 entities on the first chart; and 34 entities each on the second and third charts.

The SAO process

31. Mrs Douglas described the process to comply with the SAO requirements as follows.

(1) In addition to being the SAO for the 33 subsidiaries within the group, Mrs Douglas is also the Group SAO.

(2) As the Group SAO, she arranges in conjunction with Henderson Loggie for the production, signature and lodgement of the subsidiary company certificates for the other four SAOs.

(3) The SAO process is discussed at each quarterly meeting with Henderson Loggie, and begins following the completion of the Group audit in October of the year.

(4) The Group Organisation Chart ('GOC') is reviewed to ensure its accuracy through the addition of new companies and removal of struck-off companies.

(5) The draft SAO certificates are prepared by Henderson Loggie and forwarded to the SAOs for approval. Numerous exchanges of emails would follow before the certificates are finalised for submission.

32. An email from a Ms Pratt of Henderson Loggie to Mrs Douglas dated 25 November 2016 was referred to in oral evidence, as an illustration of the checking being performed by Henderson Loggie in finalising the GOC. In this email, Ms Pratt stated:

> 'I have used the organisation chart [attached] as the starting point and where it says that the company is dormant I have checked to the Statutory Accounts here.
>
> I have one deviation from the organisation chart and that is My Family Club Limited. It is shown as being only held 25% but the annual return at Companies House as at August 2015 and April 2016 has it has [sic] still being a subsidiary in the group. I have therefore included it and MWOL Limited.'

33. In her oral evidence, and in relation to the SAO process, Mrs Douglas stated:

(1) Mr Agnew of Henderson Loggie prepared the SAO notifications; that Henderson Loggie have 'great knowledge of how the group operates', and 'know the day-to-day running of the business'; that they are a 'reasonable large accountancy and tax firm based in Dundee' and that 'all UK taxes of the group are dealt with by Henderson Loggie'.

(2) Speaking of the compliance records for the SAO regime, Mrs Douglas said that there had been 'no penalty', 'no failures to provide notification for any company with significant tax issues' when the 'overall number of companies is between 80 and 100, of which 50 to 60 are within the SAO regime', and that was over a period of nearly 10 years, and 'only these 4 omissions'.

(3) For Castlelaw, Mrs Douglas emphasised that 'there had been no change in the period', that 'when signing the notification and certificate' the significance was to 'ensure that what was required to be done was done'.

The financial statements of Castlelaw

34. Included in the bundle are the financial statements of Castlelaw for APE 28 February 2010 and APE 31 March 2017.

(1) In APE 2010, the passive investments were stated at a cost of £1,221,000, less £1,121,000 written off to reflect impairment, leaving the net book value of £100,000.

(2) In APE 2017, the Balance Sheet of Castlelaw 2017 was identical to that for APE 31 March 2016. The fixed asset investments were valued at £100,000 and the provision of £1,121,000 was carried forward in the capital account as a negative equity.

The notification and certificate submissions

35. By email dated 23 December 2016, Mrs Douglas as Group Secretary of DC Thomson forwarded the 'SAO Group Summary' to Officer Clark of HMRC. Although Mrs Douglas mentioned that there were five SAOs in all (see §25(5)), only two SAOs would seem to be signatories for the submitted notifications, which were forwarded as email attachments.

(1) Appendix 1 as the Notification in terms of para 3 Sch 46 FA 2009, naming Mrs Douglas as SAO for a list of 35 group companies, 9 of which were marked dormant.

(2) Appendix 2 as the Notification in terms of para 3 Sch 46 FA 2009, naming Mr Gavin Jones as the SAO for 18 of the group companies, 9 of which were dormant.

36. By email also of 23 December 2016, Ms Pratt of Henderson Loggie forwarded to Officer Clark the signed SAO Certificates for DC Thomson group. There were six certificates, all dated 22 December 2016, of which four were signed by Mrs Douglas and on '*DC Thomson & Co Ltd'* headed note paper, and two were signed by Mr Gavin Jones and on '*DC Thomson Consumer Products*' headed note paper.

(1) The first by Mrs Douglas listed 17 group companies of DC Thomson group, of which 2 were dormant; (My Family Club Ltd and MWOL Ltd in §32 were on this list);

(2) The second by Mrs Douglas listed 8 group companies of a sub-group designated as 'the Puzzler Group'; four of the 8 companies in the Puzzler group were dormant;

(3) The third by Mrs Douglas listed 2 group companies of a sub-group designated as 'the Shortlist Group'; both companies were active.

(4) The fourth by Mrs Douglas listed 8 companies of a sub-group designated as 'the Brightsolid Group'; 3 of the 8 companies were dormant.

(5) The fifth by Mr Jones listed 14 companies of a sub-group designated as 'the Parragon Group', of which 6 were dormant.

(6) The sixth by Mr Jones listed 4 companies of a sub-group designated as 'the Peter Haddock Group', of which 3 were dormant.

37. The companies on the four SAO certificates signed off by Mrs Douglas corresponded to the 35 group companies listed on Appendix 1 for SAO notification, and the companies on the two SAO certificates signed off by Mr Jones corresponded to the 18 companies listed on Appendix 2 for SAO notification. The wording on each certificate is as follows:

> 'I, [name of SAO] as Senior Accounting Officer of the qualifying companies listed below, hereby certify that to the best of my knowledge and belief throughout the companies' financial year ended 31 March 2016 the companies had appropriate accounting arrangements in accordance with Schedule 46, Finance Act 2009.'

38. The details for each company on the relevant certificate are identical to those on the related notification; the details are: (a) the full name of the company; (b) designated as '(dormant)' where relevant; (c) the UTR of the company. With the exception of the first SAO certificate, which has its signature on page 2, the other five SAO certificates are all one page long. The SAO notifications as Appendix 1 and 2 are also one-page documents.

39. In cross-examination, Mrs Douglas was referred to the Notification with her as the named SAO submitted for APE 31 March 2015, and that notification included Castlelaw (and indeed DC Thomson Energy Ltd), both of which were designated as 'dormant'. It was put to Mrs Douglas that 'a check of the 2015 submission would have highlighted the omission' and that there was 'a failure to rectify the failure' when the omission was pointed out to her in the email from Craig Clark of 23 January 2017.

Enquiry into SAO compliance requirements

40. Officer Grzymek specialises in Corporation Tax within HMRC, and his duties involve carrying out risk assessments and enquiries in respect of company taxation. He spoke to the documents and the correspondence that led to the penalty assessments.

41. On 22 March 2017, Officer Grzymek was asked to review an apparent failure by entities in DC Thomson group to notify HMRC of the name of their SAO for the financial year ended 31 March 2016, and the apparent failure by the relevant SAO to provide HMRC with a certificate that appropriate tax arrangements were in place throughout the financial year.

42. On 4 April 2017, Officer Grzymek wrote to DC Thomson with the details of four group companies which HMRC identified as potentially liable to the reporting requirements under the SAO regime. It was explained in the letter that HMRC would consider whether penalties were due. Officer Grzymek advised that in some instances where a company has failed to notify its SAO in time, a penalty may not be due if HMRC are satisfied that it had a reasonable excuse for the failure, and asked the group to respond to him by 28 April 2017.

43. On 4 April 2017, Officer Grzymek also wrote to Mrs Douglas as the SAO for other companies in the group, in relation to the apparent failure to provide a SAO certificate for the same four companies so identified, two of which differed from those identified by Officer Clark by email dated 23 January 2017 (§24)[3]. The four companies named in April 2017 were:

(1) Castlelaw (no. 628) Ltd
(2) DC Thomson (Energy) Ltd
(3) Genes Reunited Ltd
(4) Brightsolid Online Entertainment Ltd

44. On 11 April 2017, Mr Agnew of Henderson Loggie sent Officer Grzymek an email with an attachment letter approved by Mrs Douglas to explain that:

(1) Genes Reunited and Brightsolid Online Entertainment had been struck off the register of companies on 26 March 2015, and therefore did not require to be included on the SAO certificates for year ended 31 March 2016.

(2) As to the other two companies, DC Thomson (Energy) Ltd and Castlelaw, the letter continued by stating:

> '… neither of these companies have filed corporation tax returns in the last five years and although we note that the guidance at SAOG11210 technically brings dormant companies into SAO, my client considered the guidance at SAOG 14320 which says "in the case of a dormant company the SAO may simply need to maintain an awareness of whether the company has remained dormant throughout the financial year" we considered that our client had done this and met their SAO responsibilities. This is the reason why these companies were not included on the 2016 certificate.
>
> Therefore, given the inactive profile of these companies, we would hope that in the circumstances you accept there is a reasonable excuse and refrain from issuing penalties.'

45. The guidance at SOG11210 is entitled 'What is a qualifying company: conditions for a qualifying company', and states as follows:

> 'A company (and this includes a dormant company or a company in liquidation or administration) must satisfy the following conditions to be a qualifying company for a financial year, see SAOG10500.
>
> It must –
>
> - Be a company incorporated in the UK in accordance with the Companies Act 2006, see SAOG11220, for the financial year and
> - Either alone or when its results are aggregated with other UK companies in the same group, have a turnover of more than £200 millions, and/or a relevant balance sheet total of more than £2 billion.'

46. The guidance at SAO14320 is entitled: 'Senior Accounting Officer main duty: What is an appropriate tax accounting arrangement', and the material parts state as follows:

[3] Two of the four companies identified in the letter of 4 April 2017, being Castlelaw and DC Thomson(Energy) Ltd, were common to those identified by Officer Clark on 23 January 2017 (at §24). The other two companies identified as 'omitted' from the GOC differed. While Genes Reunited and Brightsolid Online Entertainment were struck off and therefore not required to be included in the SAO reporting, the other two companies identified by Officer Clark, namely: Thomson Magazines Ltd and Golfing Scotland Ltd, did not feature further in the correspondence. These other two companies would seem to be correctly excluded from the SAO reporting, though the reason for their exclusion was not related in evidence.

> 'It is not sufficient just to have tax accounting arrangements. The [SAO] must take reasonable steps to ensure that these arrangements are appropriate. That requires a consideration of care and accuracy with which these arrangements are designed, used and monitored, see SAOG14400.
>
> Whether tax accounting arrangements are appropriate will depend on factors such as the size, complexity and nature of the business. For example, *in the case of a dormant company the SAO may simply need to maintain an awareness of whether the company has remained dormant throughout the year*. (italics added)
>
> Appropriate tax accounting arrangements must allow the company's tax liabilities to be calculated accurately in all material respects. …
>
> The SAO provisions are not about getting returns in on time, … They are about ensuring that the tax accounting arrangements of the company allow accurate calculation of its tax liabilities. …'

47. On 20 April 2017, Mr Agnew confirmed (in reply to Officer Grzymek's query) that his letter of 11 April 2017 should be taken as a response on behalf of Mrs Douglas in relation to the provision of SAO certificates, as well as a response for DC Thomson Group in relation to the notification of the SAO.

The penalty assessments, appeal, and review

48. On 18 July 2017, Officer Grzymek issued the penalty assessments. Prior to the issue of the assessments, the response on behalf of Castlelaw and Mrs Douglas received from Mr Agnew of 11 April 2017 and related information were referred to the 'Penalties Consistency Panel' ('PCP') according to the authorisation procedure stated in guidance SAOG19730:

> 'Once the Customer Compliance Manager (CCM), Mid-sized Customer Engagement Team (CET) or Caseworker has gathered all the information relevant to a penalty decision, they must make a referral to the Penalties Consistency Panel ("the panel").
>
> In this referral the CCM, CET or Caseworker must present all the relevant information, including a clear record of
>
> - Any technical specialist advice sought and provided, and
> - Discussions with the company / Senior Accounting Officer (SAO).
>
> They must also make a recommendation on whether a penalty should be charged or not. […]
>
> The panel will then decide whether to approve penalty action, though in sensitive or difficult cases it may instruct the CCM, CET, or Caseworker to refer to the Director in Large Business or Assistant Director in Mid-sized Business for authorisation, see SAOG19800.'

49. As related in the letter of 18 July 2017, the PCP 'did not consider the facts behind the failure constituted a reasonable excuse so a penalty has been assessed' because:

> 'The reasonable excuse presented to the Panel related to the company's dormant status and the wording of guidance in SAOG14320.
>
> The Panel indicated that the reasonable excuse presented appeared to have been based on a misunderstanding of the requirements. … in relation to the reasonable excuse presented … notification was made in respect of a number of other dormant companies in the group.'

50. On 14 August 2017, Mr Agnew of Henderson Loggie appealed against the penalty assessments, giving as grounds in support of the appeal as follows:

> '… the omission of [Castlelaw] from the certificate was an innocent oversight that occurred because the group structure used to compile the SAO certificate had inadvertently omitted the dormant company Castlelaw …
>
> …. the last corporation tax return required to be lodged for [Castlelaw] was for the year ended 31 March 2008. The SAO regime has applied to DC Thomson Group since the APE 31 March 2011 so [Castlelaw] has never had any tax accounting transactions during the entire period that the SAO regime has applied to the Group.
>
> … we would argue that a £5,000 penalty is disproportionate for an entity that has never had any transactions let alone any tax accounting transactions during the entire SAO regime.'

51. On 19 October 2017, Officer Grzymek wrote to the appellants to advise that the appeal letter of 14 August 2017 was referred to the PCP for review, which upheld the penalties for the stated reasons as follows:

> 'In his letter of 14 August [Mr] Agnew indicated that the failure arose as a result of an innocent oversight which led to [Castlelaw] being omitted in error from a copy of the 2016 group structure. While the PCP noted that this may have been relevant if the SAO certificate contained an inaccuracy, it did nto constitute a reasonable excuse for the company's failure to notify HMRC of the name of its [SAO].'

52. On 26 October 2017, Mr Agnew wrote to request a review of the PCP decision by an independent officer, giving as the grounds the following:

> 'The completion of a joint SAO certificate covering several companies as opposed to 53/17 individual certificates was done this way to reduce the administrative on the Group and has been accepted by HMRC for all years that SAO has been relevant to my client. This is therefore one name inadvertently omitted from a long list of companies as opposed to an individual certificate not being submitted. …
>
> You also say that the purpose of the SAO regime is to encourage ("tax accounting") compliance but this company has not had any tax accounting transactions in the period that the SAO regime has applied.'

53. The review conclusion decisions of 7 December 2017 upheld the penalties, having considered the grounds of appeal: (a) dormancy of the company; (b) amount of penalties being disproportionate; and (c) innocent oversight. The decision concluded that none of these grounds gave rise to a reasonable excuse for either failure.

HMRC's case

54. For the respondents, it is submitted that the group Notification lodged by DC Thomson and the Certificate provided by Mrs Douglas as the SAO were not defective in respect of the companies named on the documents. The failure is that:

> (1) Castlelaw failed to notify HMRC of the name of its SAO as required by para 3 of Sch 46;
>
> (2) Mrs Douglas as SAO for Castlelaw failed to submit a Certificate as required by para 2 of Sch 46.

55. The penalty of £5,000 is therefore assessable on Castlelaw pursuant to para 7 of Sch 46, and the penalty of £5,000 on Mrs Douglas pursuant to para 5 of Sch 46.

56. The Upper Tribunal in *Perrin v HMRC* [2018] UKUT 156 (TCC) ('*Perrin*') set out the approach that should be adopted when considering reasonable excuse. Against the ground of reasonable excuse staked on the dormancy of Castlelaw, HMRC submit that the dormancy of Castlelaw did not give rise to a reasonable excuse for the following reasons.

(1) HMRC's Guidance SAO11210 is available online and 'HM Revenue and Customs Brief 15/4 – Senior Accounting Officer updates' clearly state that a qualifying company includes a dormant company if the qualifying conditions are met. These conditions are at para 15 of Sch 46.

(2) Castlelaw is part of the DC Thomson group and is brought into the SAO regime by virtue of being a qualifying company as defined under Sch 46.

(3) The fact that Castlelaw no longer needed to complete tax returns from 2009 nor whether there was a need for Castlelaw to have appropriate tax accounting arrangements to be in place due to the dormancy of the company do not remove Castlelaw from the SAO regime.

(4) Mrs Douglas relied on HMRC guidance at SAOG 14320. The guidance does not dissolve the SAO the need to issue a certificate; the guidance merely sets out that in the case of a dormant company that the SAO may simply need to be aware that the company was dormant throughout the financial year for the company to have the appropriate tax accounting arrangements for the purposes of the SAO regime.

(5) In relation to the relevance of para 8(2)(c) of Sch 46, it is submitted that:

(a) The failure of both DC Thomson group and their external accountants to identify that Castlelaw had been omitted from the group structure chart used to compile the name of each company's SAO and the SAO certificates is not sufficient to constitute a reasonable excuse.

(b) 'HMRC also submit that reliance on the omission of Castlelaw … from the group structure chart for APE 31 March 2018 is insufficient to constitute a reasonable excuse by virtue of Regulation [sic for para] 8(2)(b) of Schedule 46.'

57. It is submitted that the appellants did not remedy their failure without unreasonable delay.

(1) Castlelaw appeared on the DC Thomson group structure chart dated 30 September 2016. As such the group and Mrs Douglas would have been aware that Castlelaw was part of the group prior to compiling the SAO notification and certificate.

(2) The group was aware of the potential omission of four companies form the DC Thomas group structure chart on 23 January 2017 when the issue was raised by HMRC by email.

(3) A response was not received by HMRC until 5 April 2017, which was a delay of over two months.

(4) The Upper Tribunal in *Perrin* summarised the decision of the First-tier Tribunal ('FTT') at [48], in which it was determined that a delay of 'about two months' after the reasonable excuse had ended was sufficient to find that Mrs Perrin 'had not remedied the failure without unreasonable delay after the excuse ceased'.

(5) HMRC submit that the notification and certificate were not submitted within a reasonable time after the failure had been identified.

The appellant's case

58. Mr Simpson's submissions distinguish between the para 5 and the para 7 penalties. There are two main grounds of appeal being advanced, and the first ground pertains only to the para 5 penalty imposed on Mrs Douglas, while the second ground is common to both appellants.

59. In relation to the para 5 penalty imposed on Mrs Douglas, it is submitted that the failure concerned an inaccuracy in the certificate provided to HMRC, and this inaccuracy took the form of an omission of the Company, and that the inaccuracy was neither careless nor deliberate as a matter of fact for the penalty to be imposable.

60. The second ground of appeal is put forward in relation to both penalties, and it is that Mrs Douglas had a reasonable excuse for the omission to provide the certificate as required under para 2 of Sch 46, and that the Company had a reasonable excuse for its failure to comply with the requirement under para 3 of Sch 46 to notify its SAO by the relevant date. A number of circumstances combined to bring about the omission to the notice of the appellants that the Company had not been included in the certificate, or the notification.

61. Mr Simpson submits that the following circumstances combined to give rise to a reasonable excuse for both appellants.

(1) The Company is one of the many entities of the DC Thomson group, which includes around 100 companies.

(2) In relation to the material financial year, Mrs Douglas was the SAO for around 33 of those companies, most of which were trading.

(3) The Company has been dormant since incorporation.

(4) In practice, no tax accounting arrangements have been required for the Company, save for checking that the Company remains dormant. This was done by Mrs Douglas as required.

(5) In relation to the tax affairs generally for the material financial year, the DC Thomson group engaged Henderson Loggie, which is a well-known and well-respected firm of chartered accountants and tax advisers.

(6) The process for preparing the certificate under paragraph 2 and the notification under paragraph 3 involved both internal staff and Henderson Loggie, whereby Henderson Loggie drafted the certificate and notification, and then these were checked by DC Thomson staff before being submitted to HMRC.

(7) By oversight, the group structure chart sent to the group's external accountants for the purpose of preparing the certificate and the notification omitted the Company.

(8) Henderson Loggie carried out a cross-check by reference to their files but did not spot the omission.

(9) Henderson Loggie accordingly drafted the certificate and the notification omitting the Company from each.

(10) Neither Mrs Douglas nor the Company noticed the omission when the certificate and the notification were finalised and signed.

(11) There was no change to either the identity of the SAO or the Company's tax arrangements from the previous financial year.

(12) A certificate and notification had been properly provided for the Company for all its previous financial years.

(13)The DC Thomson group has not been guilty of any other breach of the requirements imposed by the Sch 46 FA2009 in relation to any other financial year.

(14)Henderson Loggie were appropriate external accountants to be engaged by the Company, Mrs Douglas, and indeed the DC Thomson group to assist with the provision of SAO certificates and notifications.

62. Mr Simpson's submissions emphasise that these circumstances are put forward together. Thus, for example, it is not simply 'because' the Company is a member of a group having around 100 members that the omissions arose: rather, that fact tended to increase the likelihood that any omission might not be noticed.

63. Furthermore, the penalties were imposed for failing to provide a certificate and notification in accordance with paragraphs 2 and 3 of Sch 46. Hence, the failure was to provide those documents by 31 December 2016. The question for the Tribunal in terms of the second ground of appeal is therefore simply whether a reasonable excuse existed as at that date. It is submitted that the circumstances set out above constitute a reasonable excuse.

64. There is no case law on what constitutes a reasonable excuse in relation to SAO penalties. Mr Simpson submitted that there is no reason to adopt a different approach to that generally taken to issues of reasonable excuse. Accordingly, the appropriate approach is:

(1) Identify the failure for which an excuse is put forward. In the present case, that is the failure to provide a certificate and notification by 31 December 2016;

(2) Identify the facts put forward as constituting the excuse;

(3) Ascertain which, if any, of those facts are found proven; and

(4) Evaluate, in the circumstances of all the relevant, proven facts, whether a reasonable excuse existed for the specific failure sought to be excused, having regard to any specific direction given by the applicable legislation.

(5) Reference is made to *Perrin v HMRC* [2018] UKUT 156 (TCC) ('*Perrin*'). It is to be mentioned, however, that the dicta of Judge Poole in that case have to be read *secundum subiectam materiam*. Specifically, the case concerned daily default penalties, and not the penalty for the initial failure.

65. It is submitted that the combination of all relevant circumstances gave rise to a reasonable excuse for the appellants' respective failures, and that it is necessary only to determine whether a reasonable excuse existed at the date for compliance for the penalties to be discharged.

Discussion

The onus of proof

As a matter of fact

66. HMRC have the burden to prove that the respective penalties on Mrs Douglas under para 5 of Sch 46, and on Castlelaw under para 7 of Sch 46, have been assessed according to the terms of the legislation. The relevant facts relied upon by HMRC are:

(1) Castlelaw was a qualifying company as defined under para 15 of Sch 46 FA 2009 for the accounting period in question, which brought it within the SAO regime;

(2) The relevant SAO notification omitted to include Castlelaw;

(3) The relevant SAO certificate omitted to include Castlelaw.

67. The appellants do not dispute the above facts. There is a *prima facie* case that Mrs Douglas failed to provide an SAO certificate for Castlelaw, and that Castlelaw failed to notify its SAO as required by the compliance date of 31 December 2016. Insofar as the necessary factual conditions are concerned, they were met for the appellants to be assessed as liable to the respective penalties under paras 5 and 7 of Sch 46.

68. However, the Tribunal is of the view that as a matter of statutory construction, the factual basis of a relevant failure is the necessary but not sufficient condition for a Sch 46 penalty to be assessable.

As a matter of statutory construction

69. In terms of statutory construction, in three significant aspects the provisions under Sch 46 FA 2009 differ from other penalty regimes, such as: (a) Sch 24 FA 2007 for an error penalty in relation to a document provided to HMRC, or (b) Sch 41 FA 2008 for failure to notify a liability to tax, or (c) Sch 55 FA 2009 for failure to make a return.

70. The first difference pertains to the basis for the assessment of a penalty. A penalty under Sch 46 is assessed by 'discretion', as denoted by the use of the word 'may' in para 9(1) of Sch 46: 'HMRC *may* assess the penalty'. The statutory wording distinguishes the discretionary basis of assessment by the use of the word 'may' in sub-para 9(1)(a), from the mandatory basis of notifying a Sch 46 penalty assessment by the use of the word 'must' in sub-para 9(1)(b).

71. In contrast, '[a] penalty is payable by a person (P)' under para 1(1) Sch 24 when the specified conditions for an inaccuracy in a furnished document are obtained. Likewise, an assessment to a penalty under Sch 41 is upon the factual failure to comply with a relevant obligation: 'A penalty is payable by a person (P) where P fails to comply with an obligation specified in the Table [under para 1]'. In the case of a Sch 55 penalty, the basis of assessment is mandatory, as denoted by the use of the word 'must' in para 18(1) of Sch 55:

> '18(1) Where P is liable for a penalty under any paragraph of this Schedule HMRC must –
>
> (a) assess the penalty,
>
> (b) notify P, and
>
> (c) state in the notice the period in respect of which the penalty is assessed.'

72. The second difference pertains to the quantum of the penalty assessable. In terms of a Sch 46 penalty, the quantum is fixed at £5,000 by the statute, and the power to change the quantum is vested with the Treasury. There are no provisions for reductions for disclosure, such as those under para 9 of Sch 24, or para 12 of Sch 41, or para 14 of Sch 55. Instead, the capping provisions under sub-paras 9(3) and 9(4) of Sch 46 serve to limit the instances for which a penalty can be assessed on an SAO, or on related companies within the same group, to a single occurrence in any one relevant period.

73. The third difference concerns the absence of any provision for 'special reduction' under Sch 46, in like manner as those provided under para 11 of Sch 24, or para 14 under Sch 41, or para 16 under Sch 55. The absence of special reduction provision is perhaps a feature which can be inferred as a corollary from the two differences already noted, given that:

(1) The quantum of a Sch 46 penalty is fixed by the statute and there is no scope for reducing that quantum by discretion under 'special reduction'. HMRC's discretion lies in either assessing the penalty in question fixed at £5,000 or not at all.

(2) The special reduction provision, for example, under Sch 55 of FA 2009 gives HMRC the discretionary power to reduce a Sch 55 penalty that *must* be assessed. In contrast, since the basis for assessing a Sch 46 penalty is already by HMRC's discretion, it is otiose to provide that discretionary power again under special reduction.

(3) The absence of any special reduction provision means that HMRC's exercise of discretion to assess a Sch 46 penalty is not subject to any supervisory jurisdiction of the Tribunal, as is provided under para 17 of Sch 24, para 19 of Sch 41, and para 22 of Sch 55, whereby the Tribunal may 'substitute for HMRC's decision' if the tribunal thinks that HMRC's decision was 'flawed' in the judicial review sense.

Are the penalties validly assessed?

74. As a matter of statutory construction, it seems that the legislation anticipates that there are two distinctive stages in the decision-making process in assessing a Sch 46 penalty.

(1) The first stage concerns the exercise of a discretion vested on HMRC whether to assess a qualifying company or an SAO to a Sch 46 penalty, since a Sch 46 penalty is not mandatory even upon the relevant factual conditions being met.

(2) The second stage comes only *after* HMRC have exercised their discretion to assess a Sch 46 penalty. Once the decision has been reached to assess a penalty, and upon an appeal against the penalty assessment, it is then relevant to consider whether the company or the SAO so assessed has a reasonable excuse for the related failure.

The exercise of discretion

75. In relation to HMRC's procedure whether to assess the appellants to a penalty, Officer Grzymek emphasised that the internal procedure in SAOG19730 had been followed.

76. In this HMRC's internal manual, the use of the word 'must' occurs three times, whereby the relevant officer: (a) 'must make a referral' to the PCP; (b) 'must present all relevant information'; and (c) 'must also make a recommendation on whether a penalty should be charged or not': none of these mandatory references suggest the inclusion of 'reasonable excuse' for consideration at this stage.

77. The mandatory referral to PCP would seem to formalise a procedure for the exercise of the statutory discretion within HMRC *before* a Sch 46 penalty assessment, and would appear to be an internal mechanism to safeguard consistency in the exercise of such discretion. 'The panel will then decide whether to *approve* penalty action' as stated in the guidance (see §48), which connotes the exercise of discretion pertaining to the first stage of decision making, and according to the guidance, the consideration of reasonable excuse is not relevant to this stage.

78. Factually, the referral to the PCP happened at two junctures in the decision process.

(1) The first time was prior to the issue of the penalty assessments on 18 July 2017, and after the response of 11 April 2017 from Mr Agnew on the appellants' behalf.

(2) The second time was to refer the appeal letter from Mr Agnew dated 14 August 2017 for a review, and resulted in the respondents' reply of 19 October 2017 upholding the penalty assessments.

79. No evidence was led as to what factors had been taken into account by the PCP in exercising its discretion. The replies from Officer Grzymek related the PCP's consideration as to whether the appellants had a reasonable excuse.

(1) In the first response as related in the penalty assessments of 18 July 2017, the focus was to reject reasonable excuse based on 'the dormancy of Castlelaw' (§49).

(2) In the second response as related on 19 October 2017 after the review, the focus was to reject reasonable excuse based on 'innocent oversight' (§51). (The consideration of reasonable excuse was apt at this juncture, as pertaining to the second stage of the decision process, and after an appeal against the penalties had been made to HMRC.)

80. On the face of these two responses available to the Tribunal, the factual basis for assessing the penalties would appear to underpin the overall decision to assess the appellants to the penalties. In other words, the reasoning of the PCP appeared to be not dissimilar to the thought process required in raising a penalty which is mandatory like Sch 55, or upon the conditions specified in the statute having been met for imposing a penalty under Sch 24 or Sch 41. It is not to say that the PCP did not undertake the thought process pertinent to the exercise of its discretion. We are saying that the evidence in front of us suggests that reasonable excuse was taken into account in the first stage of the decision process, while the substance of the first stage of the decision process concerning the exercise of discretion was not evident.

81. In our judgment, factors that could have been relevant to the exercise of discretion are not the same as those factors relevant to the consideration of reasonable excuse. In the present case, the following factors would appear to be relevant in a decision that involves the exercise of discretion, but are factors that are not relevant to the existence of a reasonable excuse.

(1) the Business Risk Review findings as summarised by Officer Craig Clark give an overall impression of a group that seems to have proper regard for its compliance obligations and has in place proper measures and personnel to deliver;

(2) the 'Behavioural risk' of DC Thomas was rated 'LOW';

(3) the 'Contribution factors' of the group are positive, with the delivery of the right tax at the right time, and are 'no concerns' for HMRC;

(4) the complex organisational structure that has been noted as a 'potential risk factor', together with the existence of substantial number (circa 92) of dormant entities such as the SPVs (§30(7)) outside the organisation chart for SAO reporting;

(5) the failures concerned two group companies which were dormant at all relevant times; no tax accounting arrangements were needed; no tax liabilities arose; no CT returns were required; these are entities with no accounting footprint in the group;

(6) the collaborative approach that is supposed to underpin the working relationship between the group and HMRC through the CRM;

(7) the defaults in question arose within the context of a sizeable corporation with around 100 subsidiaries, and which appears to have an exemplary compliance history.

82. A purposive construction of the penalty provisions under Sch 46 would concur with HMRC's internal guidance SAO14320, which states that the SAO provisions 'are not about getting returns in on time', but about 'ensuring the tax accounting arrangements allow accurate calculation of its tax liabilities'. In view of the continual absence of any tax liabilities of Castlelaw, there has been no need for any substantive tax accounting arrangements to be in place. It is arguable that the SAO compliance obligations concerning Castlelaw are more a

matter of form than of substance, when compared with an entity with substantive tax accounting arrangements in place which are requisite to establishing its tax liabilities.

83. Indeed, the CRM's 2011 presentation slides would suggest that a purposive interpretation was adopted in the implementation of the SAO regime, with the focus being on 'key /significant risk areas' of the tax system, on transactions, and on governance of the business. There is pragmatism in the approach, and that HMRC are 'not looking for gold standard', and 'errors don't automatically mean failure', but that 'discovery and disclosure can be evidence of effective monitoring of arrangements'. Proportionality is a feature in this pragmatic approach, with the emphasis that appropriate tax arrangements mean 'reasonable and proportionate', not 'penny perfect', having regard to 'relative size of items in terms of the business' (see §18).

84. Above all, the SAO regime is underpinned by what Officer Clark described as 'the open and collaborative working relationship' which he said he 'very much look forward to continuing' when he introduced himself to Mrs Douglas, addressing her already on first-name term. The open and collaborative working relationship echoes what the presentation slides stated: that 'Relationship and dialogue with the CRM [being the] key', and that the SAO regime 'is not about generating revenue through penalties' or 'unnecessary admin/bureaucracy'.

85. However, as far as the evidence in front of us is concerned, it suggests that the penalties might have been assessed by construing Sch 46 penalties as mandatory upon the specified conditions having been met. 'Fettering of discretion' may arguably be relevant to a challenge of the decision to assess the appellants to the Sch 46 penalties in the first place, especially given the proximity of the Business Risk Review meeting in December 2016 to the instances of failures. The Review meeting would seem to be open, collaborative and constructive on all accounts, and would have been the appropriate backdrop in the exercise of discretion. From the Review meeting in December 2016, both sides had produced extensive notes to cover the significant areas for attention and action. Against the diverse and substantive issues in relation to the appropriate tax accounting arrangements that need to be put in place for the group, the complexity and materiality of which are ascertainable by the matters arising in connection with VAT treatments alone (see §22), the failures as regards Castlelaw, which has no tax accounting footprint in the group for a protracted period of time, have to be viewed in perspective.

86. Notwithstanding the aforesaid, the Tribunal has no jurisdiction over the matter as to whether or not, or how, HMRC might have exercised their discretion in assessing the appellants to the penalties. Fettering of discretion is a ground for judicial review, and over which this Tribunal has no jurisdiction.

The quantum of the penalties

87. In terms of the quantum of the penalties, we observe:

(1) Since the penalties are fixed in each instance by the legislation, the quantum of the assessments is not subject to appeal.

(2) HMRC have given effect to the capping provisions under sub-paras 9(3) and 9(4) of Sch 46, and have not assessed the second dormant company, namely DC Thomson (Energy) Ltd, to the equivalent penalties under paras 5 and 7, despite the same failures to notify its SAO, and to provide an SAO certificate by 31 December 2016.

(3) For clarity, we have considered the hypothetical situation wherein DC Thomson (Energy) Ltd had Mr Gavin Jones (instead of Mrs Douglas) as its SAO. The capping provision under sub-para 9(3) would have applied to cover Mr Jones' failure, by virtue

of the definition for 'senior accounting officer' under sub-para 16(3), which means the liable SAO would be confined to the Group SAO for both failures, see §8(3).

88. The legislative design as regards the quantum of an assessable penalty raises the issue of proportionality. A group of companies or an SAO is subject to the same penalty of £5,000, however many failures are involved, and whatever the nature and magnitude of the failures. Given that there is no scope for HMRC to vary the quantum in proportion to the number of failures concerned, proportionality would seem to be a relevant factor to take into account in exercising discretion. If one or two failures of a minor nature were to be penalised to the same extent as ten or twenty failures of significance, does it not mean that the number of failures, and the nature and magnitude of the failures, should play a role in the exercise of discretion to assess or not to assess a penalty in the first place?

89. For the avoidance of doubt, we consider the issue of proportionality for a Sch 46 penalty to be subsumed under its *discretionary* basis of assessment, and as a relevant factor in the exercise of discretion in the context of the fixed quantum of a penalty regime with no mitigating measures built into its design. It is not on the same level as considering the question of proportionality in the context of a penalty scheme as a whole, which was the issue addressed by Simon Brown LJ in *International Transport Roth GmbH v Home Secretary* [2003] QB 728, or by the Upper Tribunal in *HMRC v Hok* [2012] UKUT 363, *HMRC v Total Technology (Engineering) Limited* [2012] UKUT 418 (TCC), and *HMRC v Trinity Mirror Plc* [2015] UKUT 0421 (TCC).

90. In characterising the nature of the penalty under Sch 46, the conjoined features of the quantum being fixed at £5,000 on the one hand, and the capping provisions to one charge per group or per SAO on the other hand, suggest that the purpose of the Sch 46 penalties are 'not intended as pecuniary compensation for damage but as a punishment to deter re-offending': *Glantz v Finland* [2014] STC 2263 (App 37394/11) at [50]. If the nature of a Sch 46 penalty is 'a punishment to deter re-offending', the compliance history of the Company and its SAO should be a relevant factor in the exercise of discretion. It would be apt for the decision-maker to consider whether the imposition of a punitive penalty with the view of deterring re-offending is the appropriate measure, given the compliance history of the specific 'offenders'.

91. Furthermore, the penalties in question are for failure to notify the relevant SAO, and for inaccuracies in the SAO certificate through omission. Compared with similar penalty regimes, such as the error penalty regime under Sch 24, or a failure to notify a liability under Sch 41 penalty, the quantum of a Sch 24 or a Sch 41 penalty is pitched to an amount of potential lost revenue ('PLR') quantifiable by the failure in question. The feature of PLR in these penalty regimes therefore introduces an element of proportionality in quantifying the related penalty.

92. In the present case, the dormancy of Castlelaw means that no PLR would have been in point. In the absence of the PLR being a legislative feature in quantifying a Sch 46 penalty, the factor of proportionality could only have been weighed in by the exercise of discretion at the first stage of the decision-making process.

93. However, as with the fettering of discretion, proportionality is a relevant ground of challenge for judicial review, and over which this Tribunal has no jurisdiction to consider.

Special circumstances

94. Having considered Mr Simpson's submissions in some detail, we conclude that those submissions amount to 'special circumstances' and not 'reasonable excuse'. Notwithstanding

the fact that Mr Simpson has urged on the Tribunal to consider the combination of these special circumstances as collectively amount to the existence of a reasonable excuse, we are not persuaded that it is the correct application of case law to conflate 'special circumstances' with 'reasonable excuse'.

95. We agree with Judge Helier, who stated in *Rodney Warren & Co v HMRC* [2012] UKFTT 57 ('*Warren*') at [53] that the consideration of special circumstances 'must mean something different from, and wider than, reasonable excuse', for –

> '… (i) if its meaning were confined within that of reasonable excuse, paragraph 9 [of Schedule 56 FA 2009] would be otiose, and (ii) because paragraph 9 [of Schedule 56 FA 2009] envisages a reduction in a penalty rather than absolution, it must be capable of encompassing circumstances in which there is some culpability for the default: where it is right that some part of the penalty should be borne by the taxpayer.'

96. Judge Helier's articulation of 'special circumstances' is at [54]:

> 'The adjective "special" requires simply that the circumstances be peculiar or distinctive. But that does not necessarily mean that the circumstances which affect all or most taxpayers could not be special: an ultra vires assertion by HMRC that for a period penalties (sic) 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.'

97. In the present case, we are of the view that 'it would be significantly unfair to the taxpayer to bear the whole penalty'. If the statute had provided the Tribunal with any supervisory jurisdiction, equivalent to or similar to the provisions under para 17 of Sch 24, para 19 of Sch 41, and para 22 of Sch 55, we would have considered special reductions for both appellants. In the absence of any provision for special reduction, however, we can only consider the facts in the light of the case law on reasonable excuse.

Conclusion

98. Insofar as the factual conditions for the Sch 46 penalties to be assessable have been met, HMRC are entitled to assess the appellants to the penalties, as they are empowered to do so by exercising their discretion. Insofar as this Tribunal has no supervisory jurisdiction over how HMRC have exercised their discretion, we can only proceed by considering whether the appellants had a reasonable excuse for the penalties to be cancelled.

Whether reasonable excuse

99. The failures in question for which an excuse is put forward concern the failure by Castlelaw to notify its SAO and for Mrs Douglas to provide an SAO certificate for Castlelaw by 31 December 2016. It is not disputed that the failures were remedied on 5 April 2017, while the notice was first given of the failures by Officer Clark's email of 23 January 2017. The appellants have advanced the following grounds for reasonable excuse in the course of appealing to HMRC against the penalties: (a) the dormancy of the company; (b) the amount being disproportionate; and (c) innocent oversight.

100. There is no statutory definition of reasonable excuse. From case law, the approach for determining if a reasonable excuse existed for a failure is by considering whether the excuse is objectively reasonable, taking into account the circumstances and attributes of the appellants.

(1) The approach set out by Judge Medd in *The Clean Car Company Ltd v C&E Comrs* [1991] VATTR 234, while specifically refers to a VAT registered trader, has been widely endorsed as the judicial approach:

> 'The test of whether there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?'

(2) The Upper Tribunal in *Perrin v HMRC* [2018] UKUT 156 (TCC) reviews the case law on reasonable excuse, and gives guidance at [71] on whether an 'excuse' amounts to a 'reasonable excuse' in similar terms to Judge Medd's formulation:

> 'In deciding whether the excuse put forward is, viewed objectively, sufficient to amount to a reasonable excuse, the tribunal should bear in mind all relevant circumstances; because the issue is whether the particular taxpayer has a reasonable excuse, the experience, knowledge and other attributes of the particular taxpayer should be taken into account, as well as the situation in which that taxpayer was at the relevant time or times …'

(3) In relation to the extent any reliance on a third party can amount to a 'reasonable excuse' (in the context of whether 'reasonable care' has been taken by the taxpayer), Judge Berner observed at [161] in *Barrett v HMRC* [2015] UKFTT 329 (TC):

> 'The test is one of reasonableness. No higher (or lower) standard should be applied. The mere fact that something that could have been done has not been done does not of itself necessarily mean that an individual's conduct in failing to act in a particular way is to be regarded as unreasonable. It is a question of degree having regard to all the circumstances, including the particular circumstances of the individual taxpayer. There can be no universal rule; what might be considered an unreasonable failure on the part of one taxpayer in one set of circumstances might be regarded as not unreasonable in the case of another whose circumstances are different.'

(4) In relation to whether an innocent mistake can amount to a reasonable excuse, it is observed in *Garnmoss Ltd v HMRC* [2012] UKFTT 315 (TC), where there was a *bona fide* mistake made, it is stated at [12] that while the mistake 'was not a blameworthy one, the Act does not provide shelter for mistakes, only for reasonable excuse'.

(5) Similarly, in *Coales v HMRC* [2012] UKFTT 477 (TC), Judge Brannan stated at [32]: 'The test contained in the statute is not whether the taxpayer has an honest and genuine belief but whether there is a reasonable excuse.'

Dormancy of Castlelaw

101. As related earlier, the dormancy of Castlelaw may be relevant to HMRC's exercise of discretion whether to assess the penalties, but that fact, of itself, is not relevant to the defence of reasonable excuse. Even if this factor is taken at its highest, and in the manner as underpinned by the guidance (at §46), which states that 'the SAO may simply need to maintain an awareness of whether the company has remained dormant throughout the year', it amounts to at most a mistaken belief that there was no need to notify its SAO, and to provide a certificate, if Castlelaw was dormant throughout the accounting period.

102. The dormancy of a company may be relevant to the existence of a reasonable excuse if the penalty is assessed under para 4 of Sch 46 for a substantive failure by an SAO 'to comply with the main duty' as required under para 1 of Sch 46, but is not relevant to the consideration of reasonable excuse for failure to comply with the compliance requirements under para 2 for providing an SAO certificate, or under para 3 for notifying its SAO.

103. The reference to maintaining an awareness of a company's dormancy is made in the guidance in the context of what are 'appropriate' tax accounting arrangements. In that context, it presupposes that a dormant company is within the SAO regime, and that what constitutes 'appropriate' tax accounting arrangements for a dormant company may consist of no more than maintaining an awareness of its dormancy.

104. It is a fact that Castlelaw had been included in previous years for the SAO reporting. The mistaken belief, viewed objectively, was not reasonable against the subjective attributes and experience of the personnel concerned. Both Mrs Douglas and Henderson Loggie have been responsible for the SAO reporting from its inception, and are experienced and knowledgeable as regards the need to include a dormant company such as Castlelaw (which is a qualifying company as defined by Sch 46) in the SAO regime. Indeed, the SAO certificates furnished for APE 2016 included numerous companies noted as 'dormant'. The belief that the dormancy of Castlelaw, in this particular accounting period, somehow excluded it from the SAO reporting is plainly not consistent with other dormant companies in the same accounting period being included, or with Castlelaw having been included in previous periods of reporting.

Proportionality of the penalties

105. The quantum of the penalties is fixed by the statute and there is no power for varying or reducing the amount, either by HMRC or on appeal, by the Tribunal. As discussed above, proportionality may be a factor highly relevant to the exercise of HMRC's discretion to assess the penalty at the first stage of the decision-making process, but is not a factor that can be considered under the light of reasonable excuse.

Innocent oversight

106. It is averred that Castlelaw was inadvertently removed from the GOC, which was the cause of the failures to notify its SAO, and to provide an SAO certificate for it. We do not doubt that was the reason for the failures, and that the mistake was 'innocent'. However, a mistake, however innocent, does not equate to a reasonable excuse: *Garnmoss*.

Whether inaccuracy neither 'careless' nor 'deliberate'

107. Mr Simpson has put forward a defence against the para 5 penalty for Mrs Douglas that the failure was neither careless nor deliberate. This argument is merely stated but not substantiated, and may be a reference to the statutory provision under sub-para 5(4) of Sch 46 (see §7(5)), which states that an inaccuracy in a certificate was 'neither careless nor deliberate when the certificate was given'. The provision continues by stating that the inaccuracy 'is to be treated as careless if the [SAO] discovered the inaccuracy some time later, and did not take reasonable steps to inform HMRC'.

108. It is unclear to the Tribunal where this submission is leading, since the statutory provision clearly anticipates some kind of change of position being discovered, which renders a certificate that was 'correct' at the time of its submission subsequently incorrect. There was no such change of position for Castlelaw in relation to its status of being in the SAO regime to render this submission relevant.

Whether need to consider failure being remedied without unreasonable delay

109. HMRC submit that the failures were notified to the appellants on 23 January 2017, and the failures were not remedied until 5 April 2017, and as such the failures were remedied with delay. In rebuttal, Mr Simpson submits that the penalties were assessed as of the failures at the date of compliance, and that the Tribunal only needs to consider whether an excuse existed as at 31 December 2016; it is not required to consider if the excuse can be deemed to continue.

110. As a matter of statutory construction, the legislation expressly provides for the deemed 'extension' of a reasonable excuse under sub-para 8(2)(c) in the event that a said failure is remedied without unreasonable delay, with the implication that the initial existence of a reasonable excuse can be nullified upon an unreasonable delay in remedying the failure.

111. As a matter of fact, we are unable to find the existence of a reasonable excuse at 31 December 2016. Where there was no reasonable excuse at the due date of compliance, it is otiose to consider whether the failures were remedied without unreasonable delay for the purposes of deeming the continuous existence of the excuse.

Disposition

112. For the reasons stated, the appeals are dismissed.

113. The penalty under para 5 of Sch 46 FA 2009 in the sum of £5,000 assessed on Mrs Douglas as the SAO of Castlelaw is confirmed.

114. The penalty under para 7 of Sch 46 FA 2009 in the sum of £5,000 assessed on Castlelaw is also confirmed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

115. 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.

DR HEIDI POON

TRIBUNAL JUDGE

RELEASE DATE: 17 JANUARY 2020