{2017} UKFTT 0830 (TC)

TC06225

Appeal number: TC/2017/05868

CORPORATION TAX – penalty for failure to file return in time – whether penalty determination valid: held no, as not made by authorised officer of HMRC – alternatively whether appellant had reasonable excuse – held yes.

FIRST-TIER TRIBUNAL
TAX CHAMBER

KHAN PROPERTIES LTD	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: JUDGE RICHARD THOMAS

The Tribunal determined the appeal on 9 October 2017 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 20 July 2017 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 6 September 2017 and the Appellant's Reply dated 11 September 2017.

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DECISION

1. This is an appeal by Khan Properties Ltd ("the appellant") against a penalty of £100 imposed for its failure to file its company tax return for its accounting period ended 31 March 2016 by the due date.

5 **Facts**

2. The bundle I had contains HMRC's "paper submission" which take the form of a statement of case. This contains a recital of the chronology of events. From this I find the following matters as fact.

3. The appellant was issued with a notice to file a company tax return for its
10 accounting period 1 April 2015 to 30 March 2016 on 17 April 2016. That notice required the appellant to deliver the return by 31 March 2017.

4. On 19 April 2017 HMRC issued a notice informing the appellant that a penalty of £100 had been assessed for failure to file the return by the due date.

5. The return was filed electronically on 16 May 2017.

15 6. On 16 May 2017 the appellant, through its agent, Keen Young & Company, appealed to HMRC against the penalty of £100.

7. On 8 June 2017 HMRC wrote to the appellant disagreeing that the appellant had a reasonable excuse for not filing on time. They informed the appellant that they could either ask for a review or notify their appeal to the Tribunal.

20 8. On 14 June 2017 the agent sought a review.

9. On 14 July 2017 HMRC wrote to the appellant giving the conclusion of their review which was to uphold the penalty.

10. On 20 July 2017 the appellant notified their appeal to the Tribunal.

The law

25 11. The law imposing these penalties is in Schedule 18 Finance Act ("FA") 1998.

> "*Filing date*
>
> 14—(1) The filing date for a company tax return is the last day of whichever of the following periods is the last to end—
>
> (a) twelve months from the end of the period for which the return is
> 30 made;
>
> (b) if the company's relevant period of account is not longer than 18 months, twelve months from the end of that period;
>
> (c) if the company's relevant period of account is longer than 18 months, 30 months from the beginning of that period;

(d) three months from the date on which the notice requiring the return was served.

(2) In sub-paragraph (1) "relevant period of account" means, in relation to a return for an accounting period, the period of account of the company in which the last day of that accounting period falls.

Failure to deliver return: flat-rate penalty

17—(1) A company which is required to deliver a company tax return and fails to do so by the filing date is liable to a flat-rate penalty under this paragraph.

It may also be liable to a tax-related penalty under paragraph 18.

(2) The penalty is—

(a) £100, if the return is delivered within three months after the filing date, …

Excuse for late delivery of return

19 A company is not liable to a penalty under paragraph 17 (flat rate penalty) if—

(a) the period for which the return is required is one for which the company is required to deliver accounts under the Companies Act 2006, and

(b) the return is delivered no later than the last day for the delivery of those accounts to the registrar of companies.

12. Assessment of the penalties is made by way of a determination under Part 10 Taxes Management Act 1970 ("TMA"), the relevant parts of which say:

"**100 Determination of penalties by officer of Board**

(1) … an officer of the Board authorised by the Board for the purposes of this section may make a determination imposing a penalty under any provision of the Taxes Acts and setting it at such amount as, in his opinion, is correct or appropriate.

…

(3) Notice of a determination of a penalty under this section shall be served on the person liable to the penalty and shall state the date on which it is issued and the time within which an appeal against the determination may be made.

(4) After the notice of a determination under this section has been served the determination shall not be altered except in accordance with this section or on appeal.

100A Provisions supplementary to section 100

(2) A penalty determined under section 100 above shall be due and payable at the end of the period of thirty days beginning with the date of the issue of the notice of determination.

(3) A penalty determined under section 100 above shall for all purposes be treated as if it were tax charged in an assessment and due and payable.

100B Appeals against penalty determinations

5 (1) An appeal may be brought against the determination of a penalty under section 100 above and, subject to ... the following provisions of this section, the provisions of this Act relating to appeals shall have effect in relation to an appeal against such a determination as they have effect in relation to an appeal against an assessment to tax except that 10 references to the tribunal shall be taken to be references to the First-tier Tribunal.

(2) On an appeal against the determination of a penalty under section 100 above section 50(6) to (8) of this Act shall not apply but--

(a) in the case of a penalty which is required to be of a particular 15 amount, the First-tier Tribunal may—

(i) if it appears ... that no penalty has been incurred, set the determination aside,

(ii) if the amount determined appears ... to be correct, confirm the determination, or

20 (iii) if the amount determined appears ... to be incorrect, increase or reduce it to the correct amount,

…

102 Mitigation of penalties

The Board may in their discretion mitigate any penalty, or stay or 25 compound any proceedings for a penalty, and may also, after judgment, further mitigate or entirely remit the penalty.

118 Interpretation

…

(2) For the purposes of this Act, a person shall be deemed not to have 30 failed to do anything required to be done within a limited time if he did it within such further time, if any, as the Board or the tribunal or officer concerned may have allowed; and 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, 35 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 had ceased …

13. The "provisions of this Act relating to appeals" include relevantly:

"**31A Appeals: notice of appeal**

(1) Notice of an appeal under section 31 of this Act must be given—

40 (a) in writing,

(b) within 30 days after the specified date,

(c) to the relevant officer of the Board.

…

(4) In relation to an appeal under section 31(1)(d) of this Act …

(a) the specified date is the date on which the notice of assessment was issued, and

5 (b) the relevant officer of the Board is the officer by whom the notice of assessment was given.

(5) The notice of appeal must specify the grounds of appeal."

14. Those provisions also include ss 49 to 49I TMA, none of which is in issue in this case.

10 **Discussion**

Burden of proof

15. Somewhat surprisingly HMRC's submission does not address the issue of the burden of proof. It is quite clearly on them. That means that they must show that the penalty has been validly assessed or, in this case, determined.

15 *Is the penalty validly determined?*

16. I have had this year, along with many other judges of this Tribunal, a large number of cases involving penalties under Schedule 55 FA 2009. In dealing with those cases I have had to consider the decision of the Court of Appeal in *Donaldson v HMRC* [2016] EWCA Civ 761 and in that decision, Lord Dyson MR, giving the only
20 reasoned judgment, referred to the question of computers making or taking decisions.

17. There is as would be expected nothing in the submission prepared by HMRC for my consideration in this case that refers to validity or computers. Accordingly once I had drafted my decision in this case I sent that draft to HMRC and gave them the opportunity make submissions on it. They have not done so. With some refinements
25 what follows is what HMRC have seen and not commented on.

18. Section 100(1) TMA requires that:

"… an officer of the Board authorised by the Board for the purposes of this section may make a determination imposing a penalty under any provision of the Taxes Acts and setting it at such amount as, in his
30 opinion, is correct or appropriate."

19. In the papers I have three relevant documents. One is from HMRC and is a printout of a computer screen headed "Display Determined Flat Rate Penalties" (Form COT208C). It included a box for the date when "penalty made" giving 18 April 2017, the day before the issue date.

35 20. The second and third are a letter to the appellant and the "notice of penalty determination" sent to the appellant, both of which were included by the appellant's agent in the notification of the appeal to the tribunal.

21. The letter shows it to have been issued by HMRC, CT Services, Corporation Tax Services, HMRC, United Kingdom, BX9 1AX, but no name of any officer is given (unless it is a Mr or Ms C. T. Services, which seems unlikely). Despite that it starts:

5 "*I* attach a formal notice of a penalty determination *I* have made …" [my emphasis]

22. The notice of the determination emanates from the same strangely named office of HMRC, but gives no name nor does it use the first person pronoun.

23. In my view the requirement in s 100(1) TMA is for a flesh and blood human
10 being who is an officer of HMRC to make the assessment, that is to decide to impose the penalty and give instructions which may be executed by a computer (s 113(1D) TMA).

24. That officer should be named in the notice otherwise the recipient will not know to which officer to address the appeal as required by s 31A(1)(c) TMA.

15 25. The COTAX (the Company Tax computer system of HMRC) Manual of HMRC says this about penalty determinations for failures to file in time (the emboldening apart from in the heading to each paragraph is mine):

"**COM101020 COTAX Support**

COTAX deals with determinations of flat-rate and tax-related penalties
20 as follows.

Calculates the standard filing date … for every return required in response to the service of a notice to deliver.

Enables you to record a revised or deferred filing date. For more information see COM130000 onwards.

25 Issues a reminder (CT205 or CT208) to the company 28 days before the filing date, if the return remains outstanding. The reminder includes a warning about the consequences of late filing and the penalties that may be incurred.

Records the occurrence of apparent liability to a penalty for each
30 period for which a return is late under:

Para 17(1) and (2) Sch 18 FA 1998

Para 17(1) and (3) Sch 18 FA 1998

Para 18(1) and (2) Sch 18 FA 1998.

Makes and issues flat-rate penalty determinations **automatically** when:

35
- a return has not been logged onto COTAX before the expiry of 14 days from the first flat-rate (F1) or second flat rate (F2) penalty stage reached signal being set
- neither the inhibit penalty nor the no penalty required signal is set. See COM10110 for more information.

Makes and issues the first ten per cent tax-related penalty determination **automatically** 14 days after you issue a revenue determination in the absence of a company tax return, if you have not already issued the penalty using function PPEN (Prepare Penalty Determination).

Makes and issues the second ten per cent tax-related penalty determination **automatically**, when:

- the ten per cent tax-related penalty has been determined or amended and there is no open appeal
- the return is still outstanding 24 months after the end of the AP
- there have been no changes to either the tax liability or the amount of tax unpaid since the ten per cent tax-related penalty was determined or amended.

COTAX **also**:

- **allows you to make flat-rate and tax-related determinations manually using function PPEN (Prepare Penalty Determination)**
- gives you the option of going from the assessing functions to the penalty function when you use one of the assessing functions to create or amend the tax charge and it calculates that a penalty should be charged or amended
- issues notices of penalty determinations and explanatory letters to companies with copies to any authorised agent.

For further information, see this example which shows the normal sequence of events where a company fails to file its return and triggers the full cycle of automatic late-filing penalties …

See COM101011 for legislation applying to this subject.

COM101030 Copy Of Determinations

If, exceptionally, you need a paper copy of a penalty determination, you can use the [Print] button in function DPEN (Display Penalty Determination) to produce one.

The print generated is not strictly a copy of the issued determination, but a record of the data held on the COTAX record. However it is, on the face of it, evidence that COTAX issued a notice to the company on the date shown containing the figures shown on it.

You can present a screen print to the Tribunal at an appeal hearing, or provide one in response to any request for a copy of a determination from the company or the agent.

(This content has been withheld because of exemptions in the Freedom of Information Act 2000)

See COM101031 for a list of functions to use in particular situations."

The print of the screen referred to in COM101130 is not in the papers.

26. From these Manual excerpts I draw the conclusion that in this case, given the date on which the penalty was issued, it was issued automatically and not by an officer of HMRC using the PPEN function to issue it manually.

27. I further infer that the letter issued on 18 April 2017 as a covering letter for the notice of determination was not issued by an officer of HMRC but was generated automatically by the computer, despite it referring to "I".

28. The question that then arises is whether this automatic making of the determination fulfils the requirements of s 100(1) TMA.

29. There is case law on what constitutes the making of an assessment.

30. In *Burford v Durkin (HM Inspector of Taxes)* 63 TC 645 ("*Burford*") Slade LJ in the Court of Appeal said:

> "In short, I accept Mr. Mathew's submission that the assessment in the present case was 'made' for the purpose of Regulation 12(1) when Mr. MacEnhill finally signed the certificate. I respectfully disagree with the Judge's view that 'once Mr. Martin had decided to make an assessment and had calculated the amounts of the assessment, then the assessments were "made"' for the purpose of Regulation 12(1).
>
> In my view, however, it does not follow that merely because the assessment was 'made' when Mr. MacEnhill finally signed the certificate, it was he who 'made' the assessment for the purpose of applying Regulation 12(1).
>
> The Special Commissioner found as a fact that Mr. MacEnhill signed the document which completed the making of the assessment as the agent and at the request of Mr. Martin. The general principle of law is expressed in the old latin tag 'qui facit per alium facit per se' – acts done by an authorised agent are deemed to be the acts of the principal."

31. Thus the making of an assessment required a decision to do so, the calculation of the figures and the ministerial or executive act of physically making it by entering the details in an assessment book. What *Burford* decided was that the executive act need not be done by the decision maker, and s 113(1B) TMA (probably enacted as a result of an earlier decision in the case) provided at that time that:

> "Where the Board or an inspector or other officer of the Board have in accordance with section 29 of this Act, or any other provision of the Taxes Acts, decided to make an assessment to tax, and have taken all other decisions needed for arriving at the amount of the assessment, they may entrust to some other officer of the Board responsibility for completing the assessing procedure, whether by means involving the use of a computer or otherwise, including responsibility for serving notice of the assessment on the person liable for tax."

32. *Burford* was heard in the days when the last step in the procedure for making an assessment was the physical signing of a certificate in an assessment book.

33. In *Corbally-Stourton v The Commissioners for Her Majesty's Revenue and Customs* SpC 692 ("*Corbally-Stourton")* the Special Commissioner, Charles Hellier, said:

> "THE MAKING OF THE ASSESSMENT
>
> 90. In the days before widespread computer use, when an inspector made an assessment he did so by writing it in the assessment book. In *Honig v Sarsfield* (*Inspector of Taxes*) [1986] STC 246 the Court of Appeal held that for the purposes of the then provision of s 29 TMA (which differ from those relevant to this appeal) an assessment had been made when the inspector signed the certificate in the assessment book stating that he had made an assessment. In *Burford v Durkin* (*Inspector of Taxes*) [1991] STC 7 the Court of Appeal held that an assessment was made by an inspector who took the decision to assess even though the assessment book was signed, at his direction, by another.
>
> 91. Dr Branigan told me that no longer is an assessment book maintained. HMRC's practice now is that the relevant officer will write to the taxpayer indicating that an assessment is to be made and will key into HMRC's computers the amount of the assessment. That was what had happened with the appellant. Once keyed into the computer the amount appears in a record maintained by the computer (and capable of being printed out) of the taxpayer's statement. I was shown a printout of the appellant's statement which showed an entry for an 'adjustment from [self-assessment] return 18 October 2004' recording the entries made when the appellant was notified that she would be assessed.
>
> 92. Mr Barnett put the respondents to proof that the appellant had been assessed.
>
> 93. It seems to me that Dr Branigan made the assessment when, having decided to make it, he authorised the entry of its amount into the computer. I find that the assessment was made.

34. This decision is not binding on me, but I see no reason not to follow it.

35. Before considering what is required for the making of a determination for the purposes of s 100(1) TMA I need to mention gain s 113(1D) TMA:

> "(1D) Where an officer of [Revenue and Customs][1] has decided to impose a penalty under section 100 of this Act and has taken all other decisions needed for arriving at the amount of the penalty, he may entrust to any other officer of [Revenue and Customs] responsibility for completing the determination procedure, whether by means involving the use of a computer or otherwise, including responsibility

[1] By s 50 Commissioners for Revenue and Customs Act 2005, references to the Board of Inland Revenue are to be treated as references to the Commissioners for Her Majesty's Revenue and Customs.

> for serving notice of the determination on the person liable to the penalty."

36. This subsection applies specifically to penalties determined under s 100 TMA. It presupposes that an officer of HMRC makes a decision and calculates the amount of the penalty, while leaving the possibility that after that decision and calculation have been made the process may be continued by a computer recording the decision and the amount, and that it does not matter whether the keying in was done by the decision maker or by a person authorised by them. Section 113(1D) also authorises the issue or service by a computer of a notice of determination.

37. Section 113(1D) is of course consistent with the wording of s 100(1) TMA. An officer of HMRC has to make the decision and the calculation required by s 100(1). But that is not what seems to have happened in this case. It is true that no actual calculation is needed in the sense of working out what the amount of the penalty should be from some other data such as the amount of income tax shown on a return or due to be paid. But that simply means that calculation in the sense mentioned in *Burford v Durkin* and *Corbally-Stourton* is not part of the assessing making procedure. But decision making still is.

38. In this case there is no evidence of any decision making by an officer of HMRC. And COM100130 strongly suggests that there wasn't any. What that paragraph suggests is that the HMRC computer is programmed to run checks shortly after the passing of the due date for filing a return that is entered into it, and if it finds no entry for the return being received (bearing in mind that all company tax returns are filed electronically) the computer causes to be made without human intervention an entry, recorded on its hard disk or server, that a determination is made so that the date of that making will appear on a screen and the computer issues a notice of that assessment.

39. If there is a decision maker it is the computer. In *Morgan & anor v HMRC* [2013] UKFTT 317 (TC) ("*Donaldson*") Judge Barbara Mosedale said, in relation to the requirement in paragraph 4(1)(b) Schedule 55 FA 2009 that "HMRC decide that such a penalty should be payable":

> "While I am not satisfied that an action by HMRC's computer is a decision by HMRC, ….

40. I also note from that decision that HMRC's submissions in *Donaldson* included this:

> "**Meaning of "HMRC decide"**
>
> 28. In particular, it is HMRC's case that the requirement for "HMRC" to "decide" was met. It says this for a number of reasons.
>
> 29. Decision by authorised officer not required: Firstly, it contrasts it with the requirement for any particular officer to make a decision. For instance, certain penalties can only be imposed by an officer of the Board authorised by the Board for the purpose. The most obvious example is in s 100(1) TMA which provides:

> '….an officer of the Board authorised by the Board for the purposes of this section may make a determination imposing a penalty under any provision of the Taxes Acts and setting it at such amount as, in his opinion, is correct or appropriate.'
>
> Subsection (2) contains exceptions to this rule. As s 100C(1) makes clear, any penalty within the exception could only be imposed by an officer of the Board with the permission of this Tribunal. So penalties under the Taxes Acts require a decision of an authorised officer."

41. When *Donaldson* reached the Court of Appeal, the Upper Tribunal having given no view on the "computer decision" point, Lord Dyson MR said:

> "I do not, therefore, need to deal with Mr Vallat's alternative submission that para 4(1)(b) is satisfied by HMRC's computer, programmed in accordance with that policy decision, automatically issuing a penalty notice. I must confess to having considerable doubts as to whether it is correct."

42. Thus the question has not been decided authoritatively by a Tribunal or Court above this one. I was party to the *Donaldson* decision in the FTT and I did not dissent from the statement by Judge Mosedale I have quoted at §39. Indeed I expressly agreed with it – see the FTT decision in *Donaldson* at [173].

43. But if it is to be read as saying that a computer *cannot* make a decision I think it goes too far. I say that because of a provision to be found in the standard commercial compilations of tax (and particularly) National Insurance Contributions law, s 2 Social Security Act 1998 ("SSA"):

> "*Use of computers*
>
> (1) Any decision, determination or assessment falling to be made or certificate falling to be issued by the Secretary of State under or by virtue of a relevant enactment, or in relation to a war pension, may be made or issued not only by an officer of his acting under his authority but also—
>
> (a) by a computer for whose operation such an officer is responsible; and
>
> (b) in the case of a decision, determination or assessment that may be made or a certificate that may be issued by a person providing services to the Secretary of State, by a computer for whose operation such a person is responsible."

44. This section envisages that in social security matters a decision can be taken by a computer, as it gives authority for that to be done in cases where legislation requires the Secretary of State or an officer acting under his authority to make the decision.

45. There is no equivalent in TMA or any tax legislation that I can find[2], although it seems likely that s 2 SSA applies to decisions taken by an officer of HMRC in

[2] Equivalent wording appears in s 50A Child Support Act 1992 and was inserted in that Act by paragraph 51 Schedule 3 Child Maintenance and Other Payments Act on the occasion of the transfer of

accordance with s 8 Social Security Contributions (Transfer of Functions, etc.) Act 1999 in relation to NICs etc., which is why it is reproduced in the standard tax compilation volumes.

46. The conclusion I draw is that it was obviously thought necessary to authorise a computer to make a decision where the relevant legislation required the Secretary of State to make it.

47. The lack of any equivalent provision in TMA (and s 113(1B) and (1D) is not equivalent – it does a different and more limited job) means that a determination under s 100 must be made by an officer of HMRC, that is a human being.

48. What is more, s 100(1) TMA provides that the human being concerned must be authorised to make the determination. There is also some case law on this point. In *Barrett v HMRC* [2015] UKFTT 329 (TC) ("*Barrett*") this Tribunal (Judge Roger Berner) was faced with a challenge about the meaning of "authorised" in s 100(1). The first challenge related to the downgrading of the officers who were authorised to make determinations in relation to penalties charged under s 98A TMA. *Barrett* shows that until 2011 only officers at Grade 6 (senior principal, the grade immediately below the Senior Civil Service and typically the grade of a District Inspector in the Inland Revenue) and above were authorised. From 2011 all officers of HMRC were authorised whatever their grade.

49. However, it is clear from *Barrett* neither the original order of the Commissioners (or Board of Inland Revenue) nor the 2011 change related to penalties under paragraph 17 Schedule 18 FA 1998, the ones in this case. It is therefore not possible to say if, even if I am wrong to say that a computer-made determination is not valid, that any officer of HMRC who might have had some input into the penalty arrangements is an authorised officer for this purpose.

50. The other challenge to a determination in *Barrett* that is relevant here was that the officer in that case failed to exercise discretion under s 100 TMA, which uses the word "may". This, said the appellant, required HMRC to consider their powers of mitigation in s 102 TMA before making the assessment. That argument was dismissed by the Tribunal.

51. *Barrett* also considered whether the Tribunal has jurisdiction to consider questions of the sort that I have raised. Clearly I do not have the jurisdiction to consider public law arguments not expressly reserved to the Tribunal (of which there are none here). But at [93] Judge Berner said:

> "… Accordingly, I find that in respect of s 50(6) this tribunal's jurisdiction is limited to determining whether, under the provisions of the legislation, there has been an overcharge (or, as the case may be, undercharge) to tax. *That involves consideration of the statutory requirements for a valid assessment or determination*, as well as the

---

responsibility for child maintenance from the Secretary of State to the Child Maintenance and Enforcement Commission.

> question of the proper liability to tax, but it does not enable the tribunal to consider public law questions." [My emphasis]

52. In this case s 50(6) TMA is ousted by s 100B(2) but similar provisions apply in that subsection.

5 53. I am aware that an argument along the lines of the decision I have reached about s 100(1) requiring an individual officer of HMRC to make a decision, not a computer, was mentioned in *Bosher v HMRC* [2013] UKUT 579 at [69] as an argument that Mr Gordon of counsel wished to run as a new ground of appeal. The Upper Tribunal decided not to consider whether to grant Mr Gordon leave to put the additional 10 argument, partly because it was thought that it would be decided in *Barrett*, where Mr Gordon was also counsel for the appellant. It was not however argued in *Barrett*. There is then clearly no binding decision of the Upper Tribunal on this point.

54. I should also make it clear that in any case what I say is limited to the position as it applies to the penalty in paragraph 17 Schedule 18 FA 1998. In particular it 15 should not be read as applying to any of the penalties in Schedules 55 and 56 FA 2009.

Reasonable excuse

55. If I am wrong on the previous point, then I need to deal with the appellant's claim that they had a reasonable excuse within the meaning of s 118(2) TMA.

20 56. I should say that nowhere in the submission have HMRC explained why s 118(2) applies to a penalty under Schedule 18 FA 1998. That explanation is needed because s 118(2) applies "for the purpose of this Act", ie TMA. The "failure" which s 118(2) may excuse is the failure to file a return referred to in paragraph 17 Schedule 18 FA 1998 which obviously is not part of TMA. But after a bit of research I think 25 the answer is in s 117(2) FA 1998 which says:

> "Schedule 18 to this Act, the Taxes Management Act 1970 and the Tax Acts shall be construed and have effect as if that Schedule were contained in that Act."

57. The appellant's grounds of appeal are:

30 (1) This was the first ever late return by the company.

(2) The tax was paid on time so the delay caused no loss of revenue to HMRC.

(3) The delay was partly caused by HMRC "suddenly withdrawing" their CT Tax filing software for 2016 and it took time to make alternative arrangements.

35 58. HMRC say in response that:

(1) They agree that this was the first time there was a late return but say it is irrelevant.

(2) On the third ground of appeal they say that HMRC together with Companies House developed a new free online service, Company Accounts and Tax Online (CATO) for companies to file their returns. The previous free software was available for accounting periods ending on or before 31 December 2015 and remained available until 31 December 2016, the filing date for an accounting period ending on 31 December 2015. This gave a year for affected agents to make alternative arrangements.

HMRC do not address the second ground of appeal.

59. The only ground which could amount to a reasonable excuse is the argument that the appellant's accountants did not have enough time to acquire third party software following HMRC's decision to "suddenly" withdraw their free software. Section 118(2) TMA, unlike more recent provisions about what amounts to a reasonable excuse, does not contain any limitation where a person acts on behalf of another, so reliance on another such as an accountant may be a reasonable excuse.

60. In these circumstances I also find Barrett instructive:

> "154. The test of reasonable excuse involves the application of an impersonal, and objective, legal standard to a particular set of facts and circumstances. The test is to determine what a reasonable taxpayer in the position of the taxpayer would have done in those circumstances, and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard. Whilst other cases in the First-tier Tribunal may give an indication of the approach that has been taken in the particular circumstances at issue, those cases cannot be regarded as providing any universal guidance.
>
> 155. Tribunals should, in particular, be cautious in making generalised statements concerning perceived categories of case, and equally circumspect about judging what is reasonable as a matter of the legal test by reference to perceived policy. Although the relevant statutory provisions may be subject to a purposive construction, that is not the same as the setting of parameters for the application of a reasonable excuse provision by reference to the tribunal's own perception of underlying policy. In the case of s 118(2) TMA, with which this case is concerned, and which contains no reference to reliance on third parties, it is not in my view possible or permissible to discern any underlying purpose or policy with regard to such reliance from the statutory language.
>
> 156. Nor do I consider that there can be any principled distinction between cases which involve complex or "arcane" provisions of tax law, and those which may be regarded as more commonplace. That is nothing more than one of the circumstances to be taken into account in the application of the objective standard.
>
> 157. I turn then to the facts and circumstances of Mr Barrett's case. I am concerned in this respect not with the failure of Mr Barrett to deduct tax and make payments to HMRC, but with his failure to make returns, starting with the annual return for 2006-07 that was due, under regulation 40A of the Income Tax (Subcontractors in the Construction

Industry) Regulations 1993, on 19 May 2007, and subsequent monthly returns under the 2005 Regulations.

158. Mr Barrett has, since around 2000, been a self-employed small jobbing builder. He had some experience of the CIS, or at least its predecessor scheme, from the perspective of a sub-contractor, when working as part of a team on more substantial construction projects. That, argued Miss McCarthy, gave Mr Barrett an awareness of the CIS which, when coupled with his experience as an employer after 2000 and the need to operate an analogous deduction system for PAYE, would have put a reasonable taxpayer in Mr Barrett's position on enquiry as to his obligations as a contractor under the CIS.

159. Mr Barrett did not make any particular enquiry in this regard, whether in informing his choice of accountant, which was done without any investigation into Mr Aspros' capabilities and experience, but for convenience of access, or in seeking particular advice from Mr Aspros as to his obligations under the CIS. Mr Barrett simply provided Mr Aspros with the relevant paperwork, and signed, without question, everything which Mr Aspros put in front of him. Miss McCarthy submitted that Mr Barrett's failure to make any check as to the position, whether from Mr Aspros or from HMRC, was unreasonable.

160. I do not agree that Mr Barrett's actions were unreasonable. In my view, the steps taken by Mr Barrett to employ an accountant who evidently held himself out as able to provide a comprehensive service, both as regards accounting and tax, for a small business such as that of Mr Aspros, and in providing all relevant documentation to Mr Aspros, were the actions of a reasonable taxpayer in the position of Mr Barrett. Whilst Mr Barrett did not undertake any research in to Mr Aspros' capabilities before appointing him, he was reasonably entitled to assume, from Mr Aspros' acceptance of the appointment, that Mr Aspros would be competent to deal with both the accounting and tax aspects of his business. I do not accept that such a reasonable taxpayer would necessarily have taken separate steps to inform himself, independently of his accountant, of his obligations to make returns under the CIS, whether by seeking a second opinion, or by consulting HMRC, or HMRC's published guidance, himself.

161. 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.

162. I take into account the fact that Mr Barrett had some experience of a deduction scheme in the construction industry. However, that experience was as a sub-contractor in the context of larger projects, and would have given Mr Aspros no particular insight into the filing

obligations of a contractor. Mr Barrett was himself unaware of those filing obligations when he first employed sub-contractors, but he had provided Mr Aspros with all the necessary paperwork from which Mr Aspros had been able to prepare Mr Barrett's accounts, including reference to expense incurred in relation to sub-contractors; accounts referring to such expenses, both for year end 31 January 2006 and 2007, had been completed well before the filing date for the annual return for 2006-07. In my view, a reasonable taxpayer in Mr Barrett's position, having employed an accountant to deal with both accounting and tax, including, PAYE, and having provided the accountant with all relevant information with respect to his business, would have been entitled to rely on that accountant to draw attention to any relevant filing obligation. It would also have been reasonable for such a taxpayer to have concluded, from his accountant's silence, that there were no such obligations outstanding.

163. The fact that the filing obligation cannot be described as particularly complex, or arcane, does not alter the position for a notional taxpayer in Mr Barrett's position. Mr Barrett was an ordinary small trader who, taking account of his previous experience of the CIS, cannot be imbued with any particular sophistication or knowledge of the CIS so as to put him on reasonable enquiry as to obligations he had incurred merely by employing a few sub-contractors in a small way and on individual occasions. In short, it was not unreasonable for a taxpayer in Mr Barrett's position not himself to have been aware of the particular filing obligations under the CIS. This is not a case in which a taxpayer, knowing of an obligation, merely delegates that task to a third party and does not take reasonable steps to ensure that it has been undertaken.

164. In my judgment, in the circumstances of this case, it was not unreasonable for Mr Barrett to have been unaware of the filing obligations in question, and by appointing an accountant in the way that he did Mr Barrett acted as a reasonable taxpayer, aware of his own limitations in tax and accounting matters, would have done. There was nothing unreasonable in the manner in which Mr Barrett conducted his relationship with Mr Aspros, or in the timely provision of relevant information from which Mr Aspros could reasonably have been expected to identify the relevant filing requirements for a business such as that of Mr Barrett. It was not unreasonable for such a taxpayer to have assumed that Mr Aspros was able to, and would, advise on any relevant tax obligation that was apparent from the information provided to him. Nor was it unreasonable for a taxpayer such as Mr Barrett, having received from Mr Aspros no indication that any filing obligation had been incurred in respect of his use of sub-contractors, not to have raised the question himself whether there might be a filing obligation of which he was unaware, either with Mr Aspros, or HMRC, or indeed anyone else."

61. The circumstances I take into account here include that this was indeed the first failure by the appellant, and that necessarily means the first failure by Keen, Young & Company on their behalf, to file a company tax return on time. That means that the appellant would have had no reason to doubt that the trust they had placed in their

accountant to file the returns was in any way misplaced and would have given them no cause to become involved in checking that the accountants had done their job. I also take into account that the tax was paid on time and that the return was less than two months late so that paragraph 18 penalties did not arise.

62. HMRC say that the accountant had from 13 December 2015 to make alternative arrangements to file the return which was not due until 31 March 2017, thus about 15 months. They do not say what the significance of 13 December 2015 is but I infer that it was the date when HMRC announced to agents that they were withdrawing the free software and advising them where to find commercial alternatives. I take into account that this length of time cannot be regarded as the sudden withdrawal of software such as to give the accountants no time to make arrangements. I also take into account that the accountants attribute the failure to file only "partly" to this withdrawal, without saying what the other reasons were. But I also infer that if the tax was paid on time then the appellants were not at fault for not providing relevant information to the accountants.

63. Taking all these matters into account and bearing Judge Berner's very helpful statements in *Barrett* in mind I conclude that the appellant did have a reasonable excuse for its failure to file on time.

Decision

64. The penalty is cancelled because:

(1) There was no valid determination of the penalty, or, if that is wrong,

(2) The appellant had a reasonable excuse for not filing on time.

65. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 20 NOVEMBER 2017