# TC02198

**Appeal number: TC/2009/12180**

***PAYE – NICs – CIS – assessments and determinations – best judgment – presumption of continuity – whether evidence to displace assessments and determinations***

***Penalties – PAYE and NICs – s 98A(4) TMA - whether taxpayer negligent in making incorrect returns – mitigation of penalties – Tribunal jurisdiction to increase penalties – s 100B(2)(b)***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**SEACOURT DEVELOPMENTS LIMITED** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE ROGER BERNER**
**ELIZABETH BRIDGE**

**Sitting in public at 45 Bedford Square, London WC1 on 26 July 2012**

**Mr B Watkins and Mr T Sirasuthan, BBK Partnership, for the Appellant**

**Mr B Skelley, HMRC, for the Respondents**

DECISION

1. The Appellant, Seacourt Developments Limited ("Seacourt") appeals against a number of determinations by HMRC in respect of PAYE, national insurance contributions and construction industry scheme ("CIS") deductions as set out in the table below:

| **Tax years** | **Type** | **Total Tax/Penalty charged** | **Legislation** |
|---|---|---|---|
| 2002-03 to 2007-08 | NIC | £324,374 | s 8 SSCTFA 1999[1] |
| 2002-03<br>2003-04<br>2004-05<br>2005-06<br>2006-07<br>2007-08 | PAYE | £72,442<br>£72,398<br>£72,306<br>£72,224.30<br>£72,204<br>£72,176 | Reg 80, PAYE Regulations[2] |
| 2002-03<br>2003-04<br>2004-05<br>2005-06<br>2006-07<br>2007-08 | CIS | £26,214<br>£26,214<br>£26,214<br>£26,214<br>£26,214<br>£26,214 | Reg 13, CIS Regulations[3] |
| 2002-03 to 2007-08 | PAYE/NIC Penalties | £379,060 | s 98A(4) TMA[4]<br>(incorrect return) |
| 2007-08 | CIS Penalties | £25,800 | s 98A(2) TMA |

[1] Social Security Contributions (Transfer of Functions) Act 1999

[2] Income Tax (Pay As You Earn) Regulations 2003, SI 2003/2682

[3] Income Tax (Construction Industry Scheme) Regulations 2005, SI 2005/2045

[4] Taxes Management Act 1970

| | | | |
|---|---|---|---|
| | | | (failure to make a return) |

2. An appeal against the penalty determination in respect of incorrect CIS returns for the years 2002-03 to 2007-08 was determined by agreement (at nil) on 24 September 2009.

3. The total amount under appeal, aggregating tax and penalties, is therefore £1,323,181.30.

**Application to adjourn**

4. At the outset of the substantive hearing, Seacourt, through Mr Watkins and Mr Sirasuthan, made an application for proceedings to be adjourned on the basis that further information had recently come to light, as a result of which further investigations were being carried out and other documents could be obtained that would support Seacourt's appeal.

5. We considered the application, and refused it. We gave oral reasons for so doing, which we now summarise below.

6. In an application of this nature the starting point for the Tribunal is its overriding objective, as set out in rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The overriding objective of those Rules is to enable the Tribunal to deal with cases fairly and justly. That includes, by rule 2(2)(e), avoiding delay, so far as compatible with proper consideration of the issues.

7. The relevant consideration, therefore, is the interests of justice. That is not, of course a one-way street. The Tribunal is not concerned to have regard to the interests of one party only. The exercise is a balancing one, having regard to the prejudice to each party of granting, on the one hand, and refusing, on the other an application to adjourn.

8. In undertaking such a balancing exercise, all the circumstances must be taken into account including, where relevant, the history of the appeal and the history of HMRC's investigation. Where, as in this case, there has been a failure on the part of a party to comply with Tribunal directions, with Seacourt making a number of applications for time to produce further information, but with nothing of substance being provided, it is also necessary to consider the reasons for failure to comply.

9. In this case, Seacourt produced a schedule headed "Transaction Detail by Account" for each of the periods in question, which listed amounts paid, under the heading "Wages and Payroll Expenses". This was not presented as a stand alone document, but it was said that supporting evidence could be available from further information to be obtained from Seacourt's bankers. For HMRC, Mr Skelley's initial analysis had, he submitted, shown significant discrepancies between the figures in the

schedule and the P35 returns and the company's accounts. There was no analysis of the payments that showed whether the payments were to employees, or to self-employed contractors. The bank statements were available, and there was no reason to suppose that any further narrative information could be obtained. HMRC had no confidence that Seacourt was working towards provision of full and complete information.

10. The schedules produced by Seacourt, and on which this application was based, were derived from Seacourt's own computer system. It was submitted that it had only recently been possible to access those systems because of passwording by employees who had since left the company. In fact, the various printouts of the schedule were timed at after 7pm on the day before the hearing. We were informed that this was only shortly after the information had been capable of being retrieved.

11. We have to say that we found this explanation implausible. If Seacourt had made a genuine effort to pursue this appeal and to produce evidence to counter the assessments made, we are in no doubt that the information could have been accessed earlier, indeed very much earlier.

12. In these circumstances we do not consider that the prolonging of the appeal process, without any good reason at all, is in the interests of justice. The interests of justice demand access to an appeal process, adequate time for preparation, and an opportunity to be heard by an independent tribunal. All those facilities have been provided to Seacourt in this case, but Seacourt has failed, for no reason that we can accept as reasonable, to avail itself of the opportunity to put forward any evidence of substance in support of its appeal.

13. Our own analysis of the schedules belatedly produced by Seacourt confirms this conclusion. Taking the period April 2006 – March 2007, the transaction details tell us nothing about the status of any of the workers, even those whose names appear on the schedule. The names of those listed correspond to those for whom P35s were produced, but there is no evidence relating to the many other workers on whom HMRC's assessments were based, whether relating to PAYE, NICs or CIS payments.

14. In short this information can take matters no further, and is not a reason not to proceed with this hearing. Furthermore, we are satisfied that there is unlikely to be any further information relative to the schedules that could assist the Tribunal. The track record of Seacourt in these appeal proceedings gives us no confidence that there would be any result beyond further delay, and we are persuaded that there would be nothing that could justify delay in the interests of justice. There is nothing in the material now produced that leads us to conclude that any further delay is necessary to enable the Tribunal effectively to consider the issues.

15. In the context of this case, we have to say that it would have been difficult to persuade us to adjourn even if the evidence produced had appeared likely to result in further evidence becoming available. But where, as in this case, we are entirely unpersuaded that allowing Seacourt further time to prepare its case will have any meaningful impact apart from introducing further delay to the administration of

justice, we concluded that it would not be in the interests of justice to adjourn the hearing.

16. Accordingly we directed that the hearing should proceed, with a suitable short adjournment to enable Seacourt's representatives to gather their thoughts.

## The substantive appeal

17. We had a bundle of documents and a witness statement from Mr Colin Cromar, an HMRC officer with Local Compliance (Large & Complex Team) in Portsmouth, from whom we also received oral evidence. We had no witness evidence from Seacourt itself, although submissions on its behalf were made by Mr Watkins and Mr Sirasuthan.

## The facts

18. From the evidence presented to us we find the following facts.

19. Seacourt was incorporated in June 1995. In the period in question its business was that of property development, trading and investment.

20. We had copies of Seacourt's audited accounts for the periods to 31 March 2002 up to 31 March 2007. Those for the periods 2002 to 2004 were audited by Deloitte & Touche LLP, and received an unqualified audit report. Deloitte & Touche resigned as auditors on 8 November 2005 and were replaced by Grant Thornton UK LLP (appointed 30 November 2005). Note 4 to the accounts for the year ended 31 March 2003 states that Seacourt had no employees in that period, and that it used subcontractors not directly employed by it. This was not in fact the case: the P35 return filed by Seacourt for that period did disclose one employee.

21. The accounts to 31 March 2005 were qualified to the extent that the auditors were unable to establish the wider group structure of Seacourt and in particular its ultimate controlling related party. Limitations had been placed on the auditors' work regarding the recoverability of certain related party intercompany accounts. As a consequence, the auditors reported that they were unable to form an opinion whether the accounts gave a true and fair view according to GAAP or whether they had been properly prepared in accordance with the Companies Act 1985.

22. Grant Thornton resigned as auditors during the year to 31 March 2006, and BDO Stoy Hayward ("BDO") were appointed in their place. The accounts to 31 March 2006 and 2007 also received a qualified audit opinion. For the year to 31 March 2006, the auditors reported that they had been unable to confirm that opening balances did not contain material misstatements or that appropriate accounting policies had been consistently applied. They also referred to the lack of sufficient evidence concerning amounts due from a subsidiary undertaking. Subject to that, however, the accounts are stated as showing a true and fair view. Similar qualifications are referred to in the accounts to 31 March 2007.

23. The accounts to 31 March 2006 also contain a prior year adjustment in respect of 2005 recorded as follows:

> *Unrecorded liabilities*
>
> Some staff costs and services were not accounted for during the year ended 31 March 2005. The impact on the balance sheet as at 1 April 2005 is to reduce the reserves by £545,000, increase creditors due within one year by £545,000, and reduce net assets by £545,000. The loss before tax was increased by £545,000.

24. The entries in the accounts for salaries and "social security costs" (NICs) for the relevant years is as follows:

| **Year to 31 March** | **Salaries** | **NICs** |
|---|---|---|
| 2002 | Nil | Nil |
| 2003 | Nil | Nil |
| 2004 | £23,442 | £2,329 |
| 2005 | £66,310 (restated to £111,310 inclusive of NICs) | £6,138 |
| 2006 | £282,203 (inclusive of NICs) | - |
| 2007 | £209,021 (inclusive of NICs) | - |
| 2008 | Accounts not available | |

25. Seacourt filed P35 returns in respect of PAYE and NICs for the relevant periods. The amounts of PAYE and NICs shown on those returns was as follows:

| **Year** | **PAYE** | **NIC** | **Total** |
|---|---|---|---|
| 2002-03 | £60.00 | £117.00 | £177 |
| 2003-04 | £943.76 | £1,936.75 | £2,880.51 |
| 2004-05 | £8,845.52 | £11,412.49 | £20,258.01 |
| 2005-06 | £9,581.03 | £11,612.25 | £21,193.28 |
| 2006-07 | £19,827.38 | £22,765.62 | £42,593.00 |

| | | | |
|---|---|---|---|
| 2007-08 | £28,838.62 | £33,155.24 | £61,993.86 |
| **Total** | £69,146.30 | £79,949.36 | £149,095.66 |

26. The number of employees shown in the accounts and the number of P14s submitted each year with the P35 returns were:

| **Period ended 31 March** | **Accounts** | **P14s** |
|---|---|---|
| 2002 | Nil | - |
| 2003 | Nil | 1 |
| 2004 | 2 (average) | 4 |
| 2005 | 4 (average) | 7 |
| 2006 | Not shown | 7 |
| 2007 | Not shown | 8 |
| 2008 | Not available | 23 |

27. Seacourt made no returns of payments to subcontractors for any year until 2007-08. For that year the monthly returns it submitted were:

| **Month end** | **Received by HMRC** |
|---|---|
| 5 December 2007 | 7 December 2007 |
| 5 February 2008 | 21 February 2008 |
| 5 March 2008 | 14 March 2008 |
| 5 April 2008 | 7 April 2008 |

28. In August 2008, BDO submitted to HMRC a draft schedule showing payments to "workers" in 2005-06. BDO explained that they had been unable to obtain details for earlier years. The schedule showed 176 workers, including the seven employees shown on the relevant P35 return.

29. Mr Cromar scanned the BDO schedule into Excel and eliminated any names that had already been included on the P35 return. This left a revised list of workers who had not appeared on any of Seacourt's returns. Mr Cromar had no information

on the status of those workers, apart from the brief description in the schedule. He therefore used his own judgment to compile two lists, one of those likely to be engaged on an employed (PAYE) basis, and the other of those who were likely to fall within the construction industry scheme (CIS). Mr Cromar's decision was based on whether the occupation of a particular worker was traditionally likely to demonstrate the indications of self employment, such as carrying on business on their own account, providing their own tools etc (this list included tradesmen such as plumbers and carpenters), or whether they demonstrated indicators of employment status (this list included labour only labourers, office and administration staff, and those managing other workers).

30. The employee spreadsheet prepared by Mr Cromar held details of pay, but did not set out over how many weeks that pay had been earned. To give the worker the appropriate amount of tax and NIC free pay, Mr Cromar had to use a best judgment figure of their likely weekly earnings. He chose a "best estimate" figure of £300 per week, equating to £15,600 per annum. The gross pay listed on the spreadsheet was then divided by £300 to give an estimated number of weeks worked. This figure was then used to calculate the appropriate tax and NI free pay. This was then deducted from the gross pay figure for each worker and the remaining pay was charged to tax and NICs at the prevailing rate.

31. The result of this analysis was that, for 2005-06, 109 workers in addition to the seven included on Seacourt's P35 return were considered likely to be employees. Payments to those 109 workers amounted to £331,545 (gross) with the result that additional PAYE of £72,224 and NICs of £54,213 was due. (An incorrect totalling – of £64,550.57 - in a schedule sent by Mr Cromar to BDO on 6 November 2008 was corrected in the schedule sent to Seacourt on 18 December 2008.)

32. On 20 November 2008, Mr Frank Goldberg of BDO telephoned Mr Cromar to say that he would be having a meeting with Seacourt to discuss the various issues and would ask Seacourt to make a substantial payment on account. However, on 9 December 2008, Mr Goldberg again telephoned Mr Cromar to explain that he had attempted to arrange such a meeting but had been unable to do so. Mr Goldberg suggested that in light of the amounts at stake Mr Cromar might consider issuing formal determinations for all years prior to 2008. Mr Cromar agreed.

33. Over 11 and 12 December 2008 Mr Cromar reviewed the data on the P35 returns and attempted to reconcile those with the wages figures disclosed in Seacourt's accounts in an attempt to ensure that the assessments for the earlier years. He was unable to reconcile the wages figures with those disclosed in the company's accounts. He therefore, on advice from a senior manager, and in the absence of accurate figures or supporting records from Seacourt, determined to issue best estimate assessments for the other relevant years based on the 2005-06 figures. This was on the understanding that if Seacourt was able to demonstrate that the estimated figures were incorrect, HMRC would adjust the assessments accordingly.

34. On 18 December 2009 assessments were made accordingly as summarised in the table at the start of this decision.

35. Formal penalty determinations under s 98A(4) TMA in respect of PAYE and NICs were issued to Seacourt on 12 February 2009 along with a covering letter explaining how the penalties had been calculated. The maximum amount of the penalty is 100% of the difference between the amount that should have been paid or returned and the amount actually paid or returned. However, HMRC mitigated the penalty by reducing it by 10% for disclosure (maximum 20%), 20% for co-operation (maximum 40%) and 20% for seriousness (maximum 40%). The result is that the maximum penalty was reduced by 50%.

**Discussion**

*CIS return penalty*

36. We start by noting that no submissions were made on behalf of Seacourt in relation to the penalty for failure to make CIS returns. That penalty was calculated in respect of nine monthly periods up to 5 January 2008 in accordance with s 98A(2) TMA, and is based on the scale of penalties provided for by s 98A(3) and s 98A(2)(a). Following the determination, HMRC discovered that the return for the tax month ended 5 December 2007 had been submitted in time, so that no penalties are due in respect of that return. The consequence is that the penalty should be reduced by £4,200 to £21,600.

37. Absent any submissions by Seacourt on the calculations or any claim by Seacourt to have a reasonable excuse within s 118(2) TMA for the failure to make the returns in due time, our determination is that the penalty falls to be reduced to £21,600.

*PAYE/NIC/CIS assessments and determinations*

38. Since the determinations were made and appealed, HMRC have realised that 12 workers on the BDO schedule who received payments totalling £81,347 were included in the calculations both for PAYE/NIC and for CIS in error. As those workers have not been described as tradesmen and in the absence of evidence that they were self-employed, HMRC submitted that it was appropriate to continue to include those individuals in the employee calculations, but that they should accordingly be excluded from the CIS calculations.

39. The effect is that the payments on which the regulation 13 CIS determinations are based should be reduced from £145,635 to £64,288, and the amounts payable amended to the following:

| **Year** | **Rate** | **CIS deduction** |
|---|---|---|
| 2002-03 | 18% | £11,571.84 |
| 2003-04 | 18% | £11,571.84 |

| | | |
|---|---|---|
| 2004-05 | 18% | £11,571.84 |
| 2005-06 | 18% | £11,571.84 |
| 2006-07 | 18% | £11,571.84 |
| 2007-08 | 20% | £12,857.60 |

40. No submissions were made on behalf of Seacourt concerning these specific reductions. They fall therefore to be taken into account in our determinations in respect of CIS.

41. We turn therefore to the determination of the assessments and determinations in respect of PAYE, NICs and CIS deductions. We remind ourselves firstly of the burden of proof. Under s 50(6) TMA, the assessments in respect of PAYE and the reg 13 determinations in respect of CIS deductions (see reg 13(5)) are to stand good unless the Tribunal decides that Seacourt is overcharged. A similar provision operates for NICs (see reg 10, Social Security Contributions (Decisions and Appeals) Regulations 1999). The effect is that Seacourt has the burden of satisfying us, on the balance of probabilities, that it has been overcharged in respect of the PAYE assessment, or that the NIC decision should be varied in a particular manner.

42. It is clear that the determinations made by HMRC from the paucity of material made available to them could be no more than estimates. Mr Cromar was candid in saying that his analysis amounted to guesswork, although it was based on the material that he had received from BDO, and his best estimate of how that information should be analysed so as to separate employees from those who could be regarded as self-employed. We are satisfied that Mr Cromar made his determination on a rational and defensible basis, applying reasonable principles in determining the likely status of the respective workers.

43. Mr Skelley referred us in this connection to what Lord Lowry said in giving the judgment of the Privy Council in *Bi-Flex Caribbean v The Board of Inland Revenue* 63 TC 515 (at p 522):

> "The element of guess-work and the almost unavoidable inaccuracy in a properly made best of judgment assessment, as the cases have established, do not serve to displace the validity of the assessments, which are prima facie right and remain right until the taxpayer shows that they are wrong and also shows positively what corrections should be made in order to make the assessments right or more nearly right. It is also relevant, when considering the sufficiency of evidence to displace an assessment, to remember that the facts are peculiarly within the knowledge of the taxpayer."

44. The element of guesswork is of course most prevalent in respect of periods for which HMRC has been provided with no reliable information at all. In that respect HMRC is entitled to assume that the position is the same as for any period for which

information has been obtained, unless and until the taxpayer provides contrary evidence. This is the presumption of continuity, which is a necessary presumption in the absence of the real facts. And as an assumption it can of course be rebutted by evidence to the contrary. Mr Skelley referred us in this connection to the well-known judgment of Walton J in *Jonas v Bamford* 51 TC 1, where the learned judge said (at p 25):

> "… so far as the discovery point is concerned, once the Inspector comes to the conclusion that, on the facts which he has discovered, Mr Jonas has additional income beyond that which he has so far declared to the Inspector, then the usual presumption of continuity will apply. The situation will be presumed to go on until there is some change in the situation, the onus of proof of which is clearly on the taxpayer."

45. As regards periods other than 2005-06, we find that HMRC, through Mr Cromar, acted reasonably in making determinations for those periods based on the same analysis that Mr Cromar had undertaken in respect of the BDO schedule for 2005-06. The BDO schedule was the only reliable information that had been provided to Mr Cromar in this respect, and accordingly was, in our view, the only sensible way in which the assessments for the other years could have been approached.

46. Appearing before us, Mr Watkins and Mr Sirasuthan faced an uphill task, having been provided by Seacourt with precious little material on which they could make submissions which could show positively the corrections that should be made in order that the assessments can be made right or at least more nearly right. Their primary submission was that the assessment should be based on the audited accounts, and not on the assumed figures that had been used by HMRC. The accounts contained information as to numbers of employees and salaries and social security costs (NICs). The accounts had been audited, which would have required the checking of the relevant underlying information, by respected firms of accountants. The accounts to 31 March 2005, in particular, had been restated to show an increase in wages and salaries; that exercise would have required evidence on which the revised figures would have been calculated.

47. The accounts are evidence, but they are not primary evidence of the factual position regarding the use by Seacourt of employees and self-employed contractors. That would require reference to the underlying materials which only the company could provide. Whilst we accept that the usual checking would be done in the course of an audit, the auditors are themselves dependent on information provided by the company. In this case, where information for 2005-06 was provided by BDO, it could not be reconciled with the accounts for the relevant period.

48. Although we accept that the accounts were unqualified in relation to the wages and salaries, and that the qualifications in relation to the accounts were concerned with related party transactions, and not with the inadequacy of information on wages and salaries, the fact that the accounts were qualified by reference to limitations placed on the work of the auditors also gives rise to justifiable concern on the part of HMRC.

49. In our view the audited accounts are only a reflection of the company's results based on the information and accounting records provided to the auditors. It is the underlying evidence that informs the accounts. The accounts themselves, particularly where doubts as to their accuracy can reasonably be entertained, are not in themselves sufficient evidence. It would be necessary to satisfy both HMRC and, on appeal, the Tribunal, by reference to the underlying evidence.

50. Such evidence is singularly absent from Seacourt's presentation of its appeal, in spite of considerable time having been afforded to the company. In a case where the assessment of PAYE and NICs on the one hand, and CIS deductions on the other was based on an evaluation of the status of workers, it would be expected that a challenge would be supported by evidence of the status of the individual workers concerned. No such evidence has been provided.

51. Mr Watkins and Mr Sirathusan drew our attention to the fact that a number of the workers recorded in the BDO schedule were recorded as having starting dates in the year 2005-06. They argued that information relating to these employees, who would not have been employed by the company in earlier years, should not therefore have been used to inform the assessments for earlier years. We do not accept this argument. The presumption of continuity does not depend on the same employees having been in the employment of the company in the earlier periods. The nature of the work is such that it might be expected that employments would be for short terms. But the presumption is that in earlier years the same pattern would have been followed, irrespective of the identity of the employees or contractors. It is a presumption because there is no underlying evidence for those periods, and it is valid unless and until rebutted by evidence produced by Seacourt. Apart from the accounts, which, as we have described, do not persuade us to the contrary, there is no such evidence.

52. Mr Watkins and Mr Sirathusan referred to the errors admittedly made by HMRC as indicating the inaccuracy of the HMRC estimates. Those errors were acknowledged and brought to the Tribunal's attention by HMRC. We accept that the assessments are based on estimates – in the absence of evidence from Seacourt that is inevitable – but the errors identified by HMRC do not invalidate the assessments. Those are valid unless and until they are displaced by evidence sufficient to persuade the Tribunal of the correct – or more nearly correct – figures.

53. In a case of this nature, where so little underlying information has been provided by the taxpayer, it is of course the case that the assessments made by HMRC will not be correct. They are merely estimates. But that does not mean they must be discharged. They are valid and must be upheld except to the extent that the taxpayer satisfies the Tribunal as to the correct, or more nearly correct, figures. In this case, despite the efforts of Mr Watkins and Mr Sirathusan, with no real material to assist them, Seacourt has failed by a wide margin to satisfy us in this respect.

*Penalties for incorrect PAYE/NICs returns*

54. An appeal against a penalty determination in respect of PAYE and NICs is brought under s 100B TMA. In the case of a penalty other than one required to be of a fixed amount the powers of the tribunal are (s 110B(2)(b)):

> "(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,
>
> (iii) if the amount determined appears to be excessive, reduce it to such other amount (including nil) as it considers appropriate, or
>
> (iv) if the amount determined appears to be insufficient, increase it to such amount not exceeding the statutory maximum as it considers appropriate."

55. In the case of a penalty under s 98A(4) TMA, which is applicable both to PAYE and NICs (see para 7(4), Sch 1, Social Security Contributions and Benefits Act 1992) the burden of proof is on HMRC to show that the incorrect returns were made "fraudulently or negligently".

56. Mr Skelley referred to a 19th century authority on negligence, derived from a case, *Blyth v The Company of Proprietors of the Birmingham Waterworks* [1856] EWHC Exch J65, in which negligence was described as "the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." There can be no quarrel with an authority of this nature, but a more modern and, with respect, more apposite approach, derived from *Anderson (deceased) v Revenue and Customs Commissioners* [2009] UKFTT (TC) in the First-tier Tribunal, is that the test is what a reasonable taxpayer, exercising reasonable diligence in the completion and submission of the return, would have done.

57. There can be no doubt that, on the evidence before us, Seacourt did not meet the standards of a reasonable taxpayer in the submission of its relevant returns. Those returns failed to correspond to Seacourt's own accounts, they took no account of the 2005 prior year adjustment, and they failed to reflect the position evidenced by the BDO schedule. It is clear that Seacourt was negligent in the making of its returns, and we so find.

58. The maximum penalty is £758,124. This is the aggregate of the PAYE and NIC for which no return was made, as summarised in the table at the beginning of this decision.

59. As we described earlier, HMRC have mitigated this maximum penalty by applying percentage reductions in respect of disclosure, co-operation and seriousness. In each case the penalty was reduced by 50% of the maximum available reduction.

60. We have to say that in the circumstances of this case we regard HMRC's approach as over-generous. We consider the amount determined to be insufficient, and we propose to increase it to reflect what we consider to be a more appropriate level of mitigation. At the hearing we advised Mr Watkins and Mr Sirathusan of our power to increase the penalty, and sought submissions from them. They told us that they, as agents, had done everything they could. We have no reason to doubt that, but it is evident that this does not extend to Seacourt. Those submissions cannot therefore deflect us from seeking to determine a penalty that is, in our view, more appropriate to the circumstances of this case.

61. We turn first to disclosure. As HMRC themselves say, no disclosure report has been prepared by Seacourt despite requests being made by HMRC through Seacourt's agents, and despite efforts on the part of BDO. No access at all has been given to the primary records, and information has not been given promptly. The only material disclosure has been the BDO schedule. We do not consider that this level of non-disclosure should be rewarded with a discount as high as 10%. We propose to reduce the discount to 5%.

62. Next is co-operation. We agree with HMRC that although the agents engaged by Seacourt have endeavoured to co-operate with HMRC, Seacourt has not assisted in this. We have seen no evidence in the documents produced to us of any co-operation from Seacourt at all. The company has been engaged throughout in a campaign of delay and obstruction. The attempts by the agents to co-operate with HMRC have been in spite of, and not because of, Seacourt. We see no reason to mitigate the penalty at all in this respect.

63. In terms of seriousness, HMRC regarded what Seacourt has done to be very serious indeed. They say that not only have a large number of employees been omitted from the annual P35 returns, resulting in a substantial under-declaration and payment of tax and NICs, but the remainder of the workforce have not been returned on any CIS returns. Deductions were taken from all workers at the rate of 18%, irrespective of their status, but payments on account totalling only £55,000 were made to HMRC. We agree with HMRC. In light of this we are surprised that HMRC considered it appropriate to apply a discount of 20% in respect of seriousness. The very serious nature of Seacourt's failings in this regard does not in our view merit any discount or reduction.

64. In light of our own conclusions in relation to the penalty, we increase it to £720,217.80, which gives a total reduction from the maximum penalty of 5%.

**Decision**

65. For the reasons we have given:

(1) We dismiss the appeals against the Regulation 80 determinations (PAYE) and the section 8 notice (NICs) for the years 2002-03 to 2007-08;

(2) We determine the appeals against the Regulation 13 CIS determinations in the following amounts:

| Year | Amount |
|---|---|
| 2002-03 | £11,571.84 |
| 2003-04 | £11,571.84 |
| 2004-05 | £11,571.84 |
| 2005-06 | £11,571.84 |
| 2006-07 | £11,571.84 |
| 2007-08 | £12,857.60 |

(3) We increase the s 98A(4) TMA penalty for the submission of incorrect PAYE and NICs returns from £379,060 to £720,217.80.

(4) We determine the appeal against the s 94A(2) TMA penalty for late submission of the CIS returns for 2007-08 in the sum of £21,600.

**Application for permission to appeal**

66. 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.

**ROGER BERNER**
**TRIBUNAL JUDGE**

**RELEASE DATE: 15 August 2012**