Neutral Citation: [2023] UKFTT 291 (TC)

Case Number: TC08762

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2017/08517
TC/2022/00702

INCOME TAX AND NATIONAL INSURANCE CONTRIBUTIONS – whether Regulation 80 determination made – whether overpayment relief claim made – agency workers – identity of "the client" – whether services were excluded services – VAT – default surcharge – insufficiency of funds – underlying cause – whether reasonable excuse

Heard on: 2 and 3 February 2023
Judgment date: 14 March 2023

Before

TRIBUNAL JUDGE MARILYN MCKEEVER
MR LESLIE HOWARD

Between

PRISMA RECRUITMENT LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Timothy Loftus, a director of the Appellant

For the Respondents: Ms Siobhan Brown, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. With the consent of the parties, the form of the hearing was V (video). All parties attended remotely and the hearing was held on the Tribunal's VHS platform. The hearing was originally listed as a face to face hearing but was transferred to video because train strikes on day two of the hearing meant that the panel would have been unable to attend the Tribunal centre. The documents to which we were referred are a hearing bundle of 972 pages, an authorities bundle of 262 pages and the skeleton arguments of both parties.

2. We also heard witness evidence from Mr Loftus, as part of his submissions, on which he was cross-examined and from Mrs Kay Robson, an officer in HMRC's Employment Status and Intermediaries Team.

3. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

INTRODUCTION

4. This appeal relates to PAYE income tax, National Insurance Contributions (NICs) and a number of VAT default surcharges.

5. Prisma Recruitment Limited (Prisma) is an employment agency which supplied workers to other companies including The BGM Group Limited (BGM) and its subsidiary, Space Data Technology Limited (SDT) which were workplace consultancy businesses. BGM and SDT provided consultancy services to customers including Royal Bank of Scotland plc (RBS) and Barclays Capital Limited (Barclays). The work for RBS and Barclays was carried out by the workers supplied by the Appellant.

6. For convenience, we will refer only to BGM below, but this should be understood as including SDT. We will also refer only to RBS, but the same principles apply to Barclays in relation to the worker who was involved in projects for them.

7. There are five issues:

(1) Whether HMRC had made a determination under Regulation 80 of the Income Tax PAYE Regulations 2003 (the Regulations). If they had, there is an appealable decision. If not, there is no appealable decision and the Tribunal has no jurisdiction to consider the PAYE aspects of the appeal. If there is an appealable decision, Prisma contend that the PAYE tax and primary Class 1 NICs they have paid is not due.

(2) Have Prisma made an overpayment relief claim under schedule 1AB to the Taxes Management Act 1970 (TMA) in respect of PAYE and primary Class 1 NICs and, if so, is relief due? The income tax and NICs amount to £28,199.21.

(3) Were the workers providing "excluded services" within section 47(2) Income Tax (Earnings and Pensions) Act 2003 (ITEPA)? This turns on the question of who Prisma's "client" was for the purposes of section 44(1) ITEPA.

(4) Prisma appeals HMRC's decision under section 8 of the Social Security Contributions (Transfer of Functions etc) Act 1999 (the 1999 Act) that secondary Class 1 NICs are due in respect of certain workers. The amount of the NICs is £14,518.87.

(5) Prisma appeals against VAT default surcharges for the VAT periods 06/16 to 06/17 inclusive totalling £11.250, on the grounds that it had a "reasonable excuse" for the late payment of VAT.

8. Issues (1) and (2) go to the jurisdiction of the Tribunal to consider the appeal on the PAYE claims. As set out below, it was intended to deal with jurisdiction as a preliminary issue, but the matter was not resolved during the hearing of the preliminary issue on the papers. We heard representations on the matter at the present hearing and we therefore consider it now.

9. The VAT and income tax/NICs appeals were joined as the Appellant contends that the reasonable excuse arises from the same circumstances as the income tax/NICs appeal.

INCOME TAX AND NICS

The agency legislation

10. We set out the relevant provisions relating to PAYE and NICs at the outset, as we refer to terms defined in these provisions below.

11. The relevant income tax and NIC legislation is virtually identical. We will refer principally to the income tax provisions. The substantive matter turns on whether the workers were providing "excluded services" for the purposes of Part 2 Chapter 7 of the Income Tax (Earnings And Pensions) Act 2003 (ITEPA), which in turn depends on who was Prisma's "client" for those purposes.

12. Section 44 and following of ITEPA deals with the situation where an employment agency provides workers to a client in such a way that the remuneration paid to the workers is not subject to PAYE because the workers are not employees of the agency or the client. Chapter 7 operates to treat the agency as if it were the employer for the purposes of imposing on it an obligation to operate PAYE in respect of the workers. This obligation does not apply if the workers are providing excluded services. The relevant provisions are at section 44 and 47 of ITEPA, which are as follows.

> "**44 Treatment of workers supplied by agencies**
>
> (1) This section applies if—
>
> (a) an individual ("the worker") personally provides, or is under an obligation personally to provide, services (which are not excluded services) to another person ("the client"),
>
> (b) the services are supplied by or through a third person ("the agency") under the terms of an agency contract,
>
> (c) the worker is subject to (or to the right of) supervision, direction or control as to the manner in which the services are provided, and
>
> (d) remuneration receivable under or in consequence of the agency contract does not constitute employment income of the worker apart from this Chapter.
>
> (2) If this section applies—
>
> (a) the services which the worker provides, or is obliged to provide, to the client under the agency contract are to be treated for income tax purposes as duties of an employment held by the worker with the agency, and
>
> (b) all remuneration receivable under or in consequence of the agency contract (including remuneration which the client pays or provides in

relation to the services) is to be treated for income tax purposes as earnings from that employment….

47 Interpretation of this Chapter

(1) In this Chapter "agency contract" means a contract made between the worker and the agency under the terms of which the worker is obliged to personally provide services to the client.

(2) In this Chapter "excluded services" means—

(a) services as an actor, singer, musician or other entertainer or as a fashion, photographic or artist's model, or

(b) services provided wholly—

(i) in the worker's own home, or

(ii) at other premises which are neither controlled or managed by the client nor prescribed by the nature of the services.

(3) For the purposes of this Chapter "remuneration"—

(a) does not include anything that would not have constituted employment income of the worker if it had been receivable in connection with an employment apart from this Chapter, but

(b) subject to paragraph (a), includes every form of payment, gratuity, profit and benefit."

13. The equivalent NIC legislation is found at Part I of Schedule 1 of the Social Security (Categorisation of Earners) Regulations 1978. Column (A) of Part I sets out:

> "Employments in respect of which, subject to the provisions of regulation 2 and to the exceptions in column (B) of this Part, earners are treated as falling within the category of employed earner"

14. Column (B) sets out the exceptions.

15. Item 2 in column (A) provides, so far as material:

> "2. Employment … in which the person employed renders, or is under obligation to render, personal service and is subject to supervision, direction or control, or to the right of supervision, direction or control, as to the manner of the rendering of such service and where the person employed is supplied by or through some third person (including, in the case of a body of persons unincorporate, a body of which the person employed is a member) and—
>
> (a) where earnings for such service are paid by or through, or on the basis of accounts submitted by, that third person or in accordance with arrangements made with that third person;…"

16. Column (B) excepts from the category of employed earner in item 2 of column (A):

> "2. Any person in employment described in paragraph 2 in column (A)—
>
> (a) where the service of the person employed is rendered in his own home or on other premises not under the control or management of the person to whom the person employed is supplied (except where such other premises are premises at which the person employed is required, by reason of the nature of the service, to render service);…"

The facts

17. Prisma operated both as a recruitment agency, introducing personnel to its customers who hired those people directly and as an employment business, engaging and payrolling temporary and contract workers who were introduced to customers under an agency contract. This appeal concerns the employment business. Prisma engaged both individuals and companies. The companies were generally one person personal services companies within the IR35 rules. Both types of engagement were operated in the same way except that the companies were paid gross and Prisma operated PAYE in respect of the individuals, deducting income tax and primary and secondary Class 1 NICs. This appeal relates only to 13 individual workers (the workers).

18. Prisma accounted to HMRC for the tax and NICs deducted and paid secondary Class 1 NICs to HMRC. Payments were made by the 19th of the month following the month when the deductions were made and it submitted a P35 return at the year end. This appeal concerns payments made in the tax year 2012/13.

19. Prisma supplied the individuals to other businesses, charging their customers a margin over and above the amount it, Prisma, paid to the individuals.

20. Prisma specialised in providing workers in the fields of architecture, interior design and workplace change. Workplace change consultancy is carried out in occupied buildings and relates to the implementation of agile working and similar practices.

21. BGM was a major customer of the Appellant, representing at least 50% of its turnover at the relevant time.

22. BGM was a workplace consultancy business which had expanded rapidly in the period 2006 to 2008 and its client list included a number of major companies including the BBC, Rolls Royce and UBS as well as RBS and Barclays. It had its own staff, but also hired workers from Prisma to work on specific projects.

23. In 2012/13, BGM got into financial difficulties and was placed in administration on 19 April 2013. Although Prisma had little information about what was going on in relation to the administration, they terminated all agreements with BGM and SDT with the agency contracts ending on 28 March 2013.

24. Prisma paid the workers up to 28 March 2013. They did not pay income tax or NICs to HMRC after the beginning of January 2013. They received no payments from BGM or SDT after the first week in January 2013.

25. BGM owed Prisma a total of £156,926.87 which became a bad debt. This resulted in Prisma suffering a large loss and placed the company in financial difficulties.

26. Mr Loftus, as a director of Prisma, sought ways of mitigating the company's loss.

27. It is common ground that the workers were not employees of Prisma. Under the "agency legislation" (which we consider in detail below) workers provided under an agency contract are to be treated, for the purposes of PAYE and NICs as if they were employees. Prisma had, until January 2013, always operated PAYE in accordance with the agency legislation. Mr Loftus said that this was as a convenience to the employees, who could have been treated as self-employed contractors if they wished. We find that, in reality, he did not consider the status of the workers until the problems with BGM arose, but operated the agency legislation on the basis that Prisma would recover the workers' salaries, including the tax and NIC elements and the company's mark up, when their customers paid their bills.

28. It was only when BGM was no longer paying its bills that Mr Loftus began to consider the status of his workers. However the Appellant had previously treated them for tax

purposes, their status is a question of fact. Mr Loftus had been in the employment agency business since 1988 and had a good understanding of the relevant law. On considering the facts he came to the conclusion that the workers were providing "excluded services" which means that the agency legislation does not apply and there is no obligation on the company to operate PAYE or pay Class 1 NICs.

29. Prisma initially resisted paying the disputed tax and NICs but, for the reasons set out below, they did make payment of these sums under a time to pay agreement starting in June 2014.

30. Mr Loftus' first contact with HMRC was on 7 May 2013, following BGM's collapse, and related to the VAT debt. It is not clear when Mr Loftus first raised the issue of excluded services, as not all the correspondence was in the bundle, but it appears to have been quite early in the process. In a letter to the Tribunal dated 12 February 2018 Mr Loftus says:

> "The question of whether any PAYE was payable was raised by us as early as April 2013 and in writing in May 2013 before the payments had been made. The amounts were only paid between 2014 and 2016 at the request of HMRC on the basis that disputed amounts should be paid first and then argued about later."

31. In a letter to HMRC dated 25 March 2014, Mr Loftus expressly stated that he thought all the workers in question had provided excluded services and referred to the fact that these points had been "already raised".

32. On 22 May 2013 HMRC issued an underpayment notice which related to Income tax, NICs and student loan deductions for the 2012/13 tax year. It contained the statement "Your payments for the above year are less than the total due". The notice set out the items due, the amount already paid and the amount owing which, including interest was £31,760.40. This included the disputed PAYE and primary Class 1 NICs of £28,199.21.

33. A Statement of Liabilities issued by HMRC on 29 July 2013 showed PAYE/NIC underpaid of £31,936.95. Further interest had been added to the original sum.

34. On 30 July 2013 HMRC sent Prisma a letter warning of enforcement by distraint, demanding payment in full by 12 August 2013.

35. Prisma continued negotiations with HMRC into 2014.

36. Mr Loftus had a telephone conversation with a Mrs Blues, an officer of HMRC, on 2 June 2014 in connection with a Time To Pay arrangement (TTP) in which she said that the arguments on PAYE would not be considered unless payment of the tax was made. Mr Loftus' notes record that Mrs Blues said they could pursue their argument in relation to PAYE if they started to pay the tax under the TTP arrangement. The notes also record that Mrs Blues said that HMRC would not consider the argument unless they produced a written opinion from a lawyer or other expert. Mr Loftus also said that it was made clear that if Prisma did not agree a time to pay agreement HMRC would commence winding-up proceedings. We accept that the Appellant was, accordingly, under pressure to pay the tax despite continuing to dispute that it was due. It entered into the TTP agreement in order that it could continue with the dispute.

37. A time to pay agreement was issued on 1 July 2014 which related to VAT and PAYE. The total amount stated to be owed (including interest) was £74,272.89 of which £29,227.06 related to PAYE/NICs and the balance to VAT. Prisma agreed to pay £2,063 a month starting on 15 July 2014.

38. Ms Brown confirmed that where a TTP agreement related to multiple taxes the PAYE debt would be cleared first as this carries interest. This means that it would have taken 15 months to pay the PAYE which would have been fully paid by September 2015.

39. As suggested by Mrs Blues, Prisma obtained the opinion of a Mr Andrew Gotch, a Chartered Tax Adviser. His letter to Mrs Blues of 14 August 2014 set out a detailed technical analysis and concluded:

> "It follows that the services in this case were excluded services within the meaning of s.47(2)(b) ITEPA 2003. That means that the agency legislation cannot operate to impose an obligation to operate PAYE on Prisma. In the result, Prisma has operated PAYE on payments made to the workers when it should not have done so, and has thus not only overpaid amounts of PAYE and NIC but is not liable for any of the amounts of PAYE and NIC currently being pursued by HMRC.
>
> I and Mr Loftus look forward to hearing that on reflection you will agree not to pursue the element of Prisma's outstanding debt relating to PAYE & NIC and will consider the possibility of repaying any deductions so far paid over by Prisma relating to PAYE & NIC deducted incorrectly."

40. We find that the Appellant had raised the excluded services argument before the tax was paid and only agreed to make the payment of tax it believed was not due in order to prevent enforcement action by HMRC.

41. The Appellant made an in time appeal to the Tribunal in relation to the PAYE/NICs on 27 November 2017, along with its appeal against the VAT default surcharges.

42. HMRC did not reply to Mr Gotch's letter until 19 July 2018, when directed by the Tribunal to do so. That letter concluded that the workers did not provide excluded services as the "client" was RBS and the services were provided at RBS's premises.

43. The parties returned to the Tribunal on 15 January 2019. HMRC contended that the tribunal did not have jurisdiction to consider the Appellant's claim regarding income tax as HMRC had not made any appealable decision, that is they had not made a determination under Regulation 80 of the Regulations (a Section 80 determination). Judge Mosedale gave directions for HMRC to provide reasoned submissions on the jurisdiction issue and also on whether a claim had been made and/or refused for repayment of overpaid tax under Sched 1AB TMA.

44. HMRC submitted that it had not made any Regulation 80 determination because they believed that Prisma had made the correct deductions of tax and National Insurance Contributions on behalf of the workers. It further submitted that on the basis that the tax had been paid on behalf of the workers, any repayment due would be payable to the workers, not the Appellant.

45. The statutory provisions relating to NICs are equivalent to the PAYE legislation. HMRC considered that as the NICs had been correctly calculated and paid, they did not need to make a decision under section 8 of the 1999 Act (a section 8 decision) and so, again there was no appealable decision. And again, any repayment of primary Class 1 NICs would belong to the workers.

46. HMRC also argued that the Appellant had not made an in time overpayment relief claim under schedule 1AB TMA that satisfied the criteria set out in HMRC's guidance at SAC12150.

47. The Appellant submitted that a Regulation 80 determination had been made, that an overpayment relief claim had been made and refused, and that any repayment would belong to the Appellant.

48. A letter from the Tribunal dated 5 June 2019 stated that Judge Mosedale had directed that there be a further hearing to determine the issue of jurisdiction and the letter set out her understanding of the jurisdiction position at that point and what issues remained to be resolved. HMRC made further submissions on this on 3 July 2019 and in particular stated why they considered no overpayment relief was due.

49. A further hearing was listed for 4 November 2019 but this was postponed to allow HMRC to issue a section 8 decision. Section 8 of the 1999 Act permits HMRC to decide, among other things, the employment status of a worker and whether a person is liable to pay NICs and if so, the class and amount payable. On 7 January 2020 HMRC issued section 8 decisions for each of the workers determining that each one was an employed earner, that Prisma was liable to pay primary and secondary Class 1 contributions for the relevant period (14 January to 27 March 2013) and stating the amount payable for each worker and the fact that it had been paid. The amount of secondary Class 1 NICs was £14,518.87.

50. Prisma appealed against the section 8 decision on 27 January 2020. An internal review upheld the decision on 8 January 2021.

51. ADR was subsequently attempted but failed.

52. The Appellant made a second appeal to the Tribunal on the section 8 decision on 19 January 2022. The two appeals were subsequently joined.

The arrangements between Prisma, BGM and RBS

53. Following ADR, the sole issue between the parties was as to who was the "client" of the Appellant. The Appellant's view is that it was BGM and the Respondent's view is that it was RBS.

54. BGM was in the business of workplace change. It was a consultancy providing services to its clients, including RBS, enabling them to adopt "agile" working practices and reduce the space needed for their operations. This is confirmed in the report of the administrators which states:

> "The Company provided strategic workplace solutions to a number of significant corporate clients from two leasehold offices in London and North Wales. The primary services offered by the Company were office space management and move management."

55. We find BGM was an operating business and neither a recruitment agency nor an employment business.

56. Prisma supplied the workers to BGM under two contracts: a contract with the worker and a contract with BGM. The contract with BGM was subject to Prisma's terms and conditions. These were included in the bundle as were examples of both types of contract.

57. The worker contract was from 15 January 2013. It gave a Ms R details of her "temporary assignment" and told her to report to an individual at BGM. It set out the start date and time and the hourly rate of pay. It required timesheets (provided by Prisma) to be submitted weekly but the timesheets and hours had to be approved by the client, whose decision as to hours worked was final and no payment would be made until the client approved the timesheet.

58. The letter went on to state:

> "Prisma Recruitment Limited has arranged this employment as a contract for services. This means that Prisma Recruitment Limited will act and assume the role of an employment business for the limited purpose only of wage payments, statutory deductions of Income Tax and National Insurance contributions and other contributions as lawfully instructed by your employer or as required by the law. In all other respects, statutory or otherwise you are under the direct control of the employer company named above.
>
> Timesheets will be processed only on the understanding that all matters relating to this agreement including deductions for tax and national insurance and all matter relating to statutory hours/holidays and other entitlements have been settled to your satisfaction."

59. So the contract provided that Prisma was not Ms R's employer, but it would deduct income tax and NICs.

60. The corresponding contract with BGM confirmed that Ms R was a temporary worker and described BGM as the "employer". It also set out the rate to be charged for her services. The letter stated that Prisma would provide Ms R with timesheets which needed to be approved by BGM and sent to Prisma.

61. The letter further provided:

> "Please ensure that timesheets are completed to your satisfaction, as by approving the timesheets you take responsibility for a payment to the temporary worker being made, and indicate your acceptance of the terms of this agreement. You also undertake to re-imburse us in accordance with the enclosed confirmation agreement and our terms and conditions of business. By allowing the worker named below to carry out work on your behalf you undertake to ensure full compliance with any employment or other regulations, which may be in force with regard to the temporary worker…"

62. Clause 1 of Prisma's terms of business provides that the contract is between Prisma and the "Employer Hirer, hereinafter called the Client". From Prisma's perspective, therefore, BGM is the "client".

63. Clause 13 provides that the Client undertakes to interview all personnel introduced to them and the Client is responsible for deciding the suitability and competence of the workers introduced.

64. Clause 16 provides that Prisma cannot direct or control any of the temporary workers and the Client is responsible for directing and controlling the workers. It states:

> "All personnel introduced will adhere to the Client's normal working time and operating procedures and unless otherwise expressly agreed in writing by a director of the Company, the Client will be responsible for all technical supervision of the temporary personnel. The Client is wholly responsible for direction of all personnel with regard to statutory working hours, health and safety and all other statutory obligations and all personnel introduced to the Client by the Company will be under the exclusive control of the Client in all respects. The Client undertakes to treat all personnel introduced by the Company in the same manner as the Client's own staff and in accordance with the law. The Company has no power to direct, or control any personnel, temporary or otherwise,…"

65. The Client must reimburse Prisma for all payments Prisma makes to the workers on the basis of an authorised timesheet (clause 17).

66. Clause 22 provides that subject to being reimbursed under clause 17, Prisma will:

> "…act and assume responsibility of an Employment Business for the limited purpose only of payment of wages, deductions and payments in respect of Income Tax, National Insurance and other statutory contributions or payments which may from time to time become due."

67. Clause 27 expressly provides that the terms are a contract between Prisma and the Client and does not give or intend to give rights to anyone else.

68. The bundle contained examples of the timesheets completed by the workers. Some were produced by Prisma, but there was an example of a timesheet produced by BGM. The BGM timesheet for a particular worker indicated who the client (BGM's client) was, the reference for the project and a "title" which was an address. In the example we saw, BGM's client was RBS in relation to each of the projects. We infer the address was where it was carried out. None of the addresses were those of BGM or SDT.

69. Mr Gotch states in his letter that no services at all were provided at premises controlled or managed by BGM. All services were provided at RBS premises.

70. Mr Loftus expanded on this. Some of the projects, such as a space utilisation survey would have required the worker to be onsite, but the workers could, and did, work anywhere. They could work at home, or in coffee bars as well as at RBS's premises. He confirmed in cross-examination that they did not perform any services at BGM premises.

71. There were some potentially inconsistent documents in the bundle. The sample contract with BGM, stated "Please find enclosed details of Ms R who will be commencing work within your offices on 28th January 2013." This appeared to be a standard form letter and we do not consider that it necessarily means that Ms R would be working at BGM's offices. In Mr Loftus' submissions to HMRC in connection with ADR, he stated: "The recruitment process would start with a BGM manager or the BGM HR Manager requesting suitable candidates from Prisma to work on a variety of roles both in the BGM London or Colwyn Bay offices, or on site on one or more of their customer projects." Taking account of the context as set out in the longer extract at [74] below, we read this as meaning that some personnel provided to BGM worked at their offices and others worked onsite,

72. Following ADR, the only issue was the identity of the "client" and HMRC's submissions in their Statement of Case and Skeleton Argument focussed on their view that the "client" was RBS and the services were provided at RBS premises. Ms Brown did not challenge Mr Loftus' evidence that none of the workers worked at BGM premises.

73. Having taken all of the written and oral evidence into account, we find as a fact that the workers did not provide any services at premises managed or controlled by BGM.

74. The Appellant described the relationship between it, BGM and RBS in its submissions to HMRC following ADR of July 2021.

> "BGM's presence could be liked (sic) to management consultants or auditors, who needed to look closely at the fabric and operation of the customer business before proposing change….
>
> As a recruitment agency operating in this sector and particularly because Prisma had come from the architectural and design recruitment sector they were able to supply large numbers of individuals to BGM to work on these various projects….
>
> All of the individuals concerned are designers, architects or project managers. BGM had its own internal management structure and its own account managers managing individual customers. The recruitment process

> would start with a BGM manager or the BGM HR Manager requesting suitable candidates from Prisma to work on a variety of roles both in the BGM London or Colwyn Bay offices, or on site on one or more of their customer projects. The individuals were then interviewed by either the BGM manager or the BGM manager and the BGM HR manager. Many people were engaged as contractors given the finite nature of all building projects. These contracts are attached and are formed of a letter to the worker, Terms of (sic) conditions of business and a letter to the contractual client (BGM). Together with the terms these letters clearly identify the client as The BGM Group Limited. Prisma always operated on the basis that an agency contract consisted of an agreement with the worker, which identified a particular client/employer. There was a further agreement between Prisma and that client employer. These three parties were identified respectively as worker, client and agency. There were no other parties to either agreement.
>
> On appointment the individuals would work under the broad direction of the BGM manager(s) but given the nature of the work i.e., space analysis, occupancy patterns, devising strategy and planning the implementation process, they would work autonomously on a day to day basis. No one within RBS or any other customer of BGM's had any part in who was hired or why. BGM charged consultancy fees based on project stage completion and did not re-bill time worked directly to their customers."

75. As set out above, the workers' were paid on the basis of time sheets completed by the workers and approved by BGM.

76. At the hearing Mr Loftus stated that the workers were working for BGM. He did not have actual knowledge of what happened on a day to day basis as he simply provided the workers to BGM, but he could see in general terms what they did from the timesheets. Prisma supplied the workers to BGM. BGM entered into consultancy contracts with their, BGM's, customers, such as RBS, to provide consultancy services and BGM assigned the workers and other staff to the consultancy projects.

77. There were documents in our bundle which suggested that the workers' services were being provided to RBS rather than BGM. In a letter from Prisma to HMRC of 25 March 2014, Mr Loftus had said:

> "We …returned to profit in 2010, 2011 and 2012. We were by that time supplying The Royal Bank of Scotland (RBS) with approximately 25 contractors and this was routed by RBS's own 'tier one' service provider, The BGM Group Limited (BGM)…."

78. And:

> "…the contractors in question were all located at RBS premises and were not under the supervision or control of either of ourselves or the BGM Group Limited…"

79. Notes of a meeting held on 22 January 2016 between Mr Loftus and HMRC state:

> "In 2013 Prisma was supplying contractors to a number of UK banks primarily The Royal Bank of Scotland (RBS). Payment for these contractors was routed via a 'supply chain' at the head of which was a 'tier one; service provider. This company was called the BGM Group Limited (BGM)…
>
> … Prisma would add, none of these workers provided their services to Prisma, BGM or SDT. Twelve supplied services to RBS, one to Barclays Capital. There is no agency contract between RBS and Prisma or Barclays Capital and Prisma"

80. Ms Brown put it to Mr Loftus that these statements indicated that Prisma was supplying the workers to RBS and the workers were providing their services to RBS.

81. Mr Loftus explained that he had been trying to explain the situation simply and in broad terms and had, perhaps, used "sloppy language". Neither the letters nor the meeting notes were intended to provide a technical or legal analysis. Further, the term "services" can mean different things depending on the context. Legally, Prisma provided the workers to BGM and the workers were required to provide their services to BGM. BGM deployed the workers at RBS in order to provide the consultancy services to RBS which BGM had contracted to provide to RBS. In that sense, the workers were providing their services to RBS in the same way as a waiter in a restaurant provides service to the restaurant's customers. There would be no suggestion that the waiter is employed by their employer's customer: the purpose of their employment is to serve those customers.

82. It would seem that Prisma had attempted to claim the fees unpaid by BGM from RBS. We did not have a copy of the preceding correspondence, but the bundle did include a letter from RBS dated 1 October 2014 which stated:

> "You clearly have strong views on the extent of the contractual relationship, however, our view remains that the transfer of staff was under the control of the Administrator acting for BGM, and not RBS directly.
>
> Furthermore, it should also be noted that none of. the BGM staff reported directly to RBS employees. BGM had its own reporting structure and our management of BGM was via regular reviews with BGM senior management not the contracted employees. The documentation attached with your letter is not from RBS to BGM but from Sean Cormack, who was a BGM employee, to a BGM contractor, and no one in the e-mail chain is an RBS employee."

83. This makes it quite clear that the workers were not under the control of RBS. They were managed by BGM and only BGM had a contractual relationship with RBS. Prisma had no contractual relationship with RBS. The workers provided their services to RBS in the sense that the work they did was ultimately for the benefit of RBS, but they were employed by BGM and obliged to provide their services to BGM. The person who had contracted with RBS to provide services was BGM, but being a company it could only provide those services by directing individuals to carry out the work on those contracted projects.

84. We find that the workers provided their services to BGM and did not themselves provide services to RBS although they did the work which enabled BGM to provide its consultancy services to the bank.

Late appeal

85. The 2022 appeal against the section 8 decision was late. HMRC do not object to the late appeal and to the extent it is necessary to do so, we grant permission for the late appeal.

The jurisdiction issue

86. The jurisdiction issue was set out in a letter from the Tribunal to the parties in which Judge Mosedale summarised the position and set out what the Appellant needed to do. She said:

> "While reference ought always be made to the precise legislation conferring jurisdiction, in general it is normally right to say that the Tribunal only has jurisdiction over a decision of HMRC where the decision is either (a) a decision that tax is owing or (b) a refusal to repay tax claimed to be overpaid. In this case, HMRC do not accept that they have made a decision over which the Tribunal has jurisdiction….

> HMRC's position is that they have not made a s 80 determination in relation to PAYE nor a s 8 decision with respect to NICs; therefore, say HMRC, there is no determination or decision which could be the subject of an appeal.
>
> The Judge's view is that it is for the appellant to identify a specific letter or letters or other communication which it claims amounts to such a determination or decision. …
>
> It seems clear that HMRC have made a decision refusing to repay the PAYE and NICS which the appellant considers it overpaid: so under this heading the question is not whether HMRC made a decision to refuse repayment, as it seems clear that they did, but whether the appellant made a claim recognised under the Taxes Act for repayment over which this Tribunal has jurisdiction….
>
> …the Judge's preliminary view is that Sch 1AB TMA is the applicable schedule for alleged overpayments of PAYE. Moreover, so far as PAYE is concerned, it seems accepted that the Tribunal would have jurisdiction over refusals to repay a Sch 1AB TMA claim. So the question here is whether the appellant actually made a timely and valid Sch 1AB claim….But again the parties have not addressed the issue of what form a Sch 1AB claim must take in any kind of detail in their submissions."

87. Judge Mosedale also required submissions on paragraph 4 of schedule 1AB.

88. At the time of the letter, no section 8 decision had been made about NICs, but HMRC subsequently made such a decision and that is the subject of a valid appeal.

89. The first paragraph in the summary above sets out two types of decision, either one of which would give the Appellant a right of appeal. The first is a decision that tax is owing which would require HMRC to have made a Regulation 80 determination. The second is a refusal to pay tax said to be overpaid which requires HMRC to have refused an overpayment claim under schedule 1AB TMA.

Was there a Regulation 80 determination?

90. Judge Mosedale also noted that the Appellant said he paid the tax after receipt of a Regulation 78 notice issued on 22 May 2013, although he had not produced a copy of it at that stage. The Appellant's representations to the Tribunal did not say that it had received such a notice. They commented on what a number of the Regulations did and said that Regulation 78 provides for the collection of underpaid amounts by HMRC. The representations go on to say "The amount in dispute was included in an underpayment notice issued by HMRC to the Appellant on 22 May 2013."

91. Regulation 78 provides, so far as material:

> "**Notice and certificate if tax may be unpaid**
>
> 78.—(1) This regulation applies if, 17 days or more after the end of a tax period, condition A or B is met.
>
> (2) Condition A is that—
>
> (a) an employer has not paid any tax under regulation 68 for that tax period, and
>
> (b) the Inland Revenue have reason to believe that the employer is liable to pay an amount of tax.
>
> (3) Condition B is that—

(a) an employer has paid an amount of tax under regulation 68 for that tax period, but

(b) the Inland Revenue are not satisfied, after seeking the employer's explanation, that it is the full amount which the employer is liable to pay for that period.

(4) The Inland Revenue, on consideration of the employer's record of past payments, may—

(a) specify, to the best of their judgment, the amount of tax which they consider the employer is liable to pay, and

(b) serve notice on the employer requiring payment of that amount within 7 days of the issue of the notice ("the notice period")….

(8) If the amount of tax specified in the notice, or any part of it, is not paid during the notice period—

(a) the amount unpaid is treated as an amount of tax which the employer was liable to pay for that tax period under regulation 68, and

(b) the Inland Revenue may prepare a certificate showing how much of that tax remains unpaid.

(9) But paragraph (8) does not apply if during the notice period—

(a) the employer pays the full amount of tax which the employer is liable to pay under regulation 68 for that tax period, or

(b) the employer satisfies the Inland Revenue that no amount, or no further amount, is due for that tax period."

92. We know that the Appellant did not pay the tax within seven days of 22 May 2013 or satisfy HMRC that no tax was due. No certificate referred to in paragraph (8) has been produced.

93. Regulation 78 is important as a determination under Regulation 80 can only be made if there has been no certification under Regulation 78. Further, Regulation 78 does not include a right of appeal, whereas Regulation 80 does. Regulation 80 provides so far as material:

"**Determination of unpaid tax and appeal against determination**

80.—

(1) This regulation applies if it appears to the Inland Revenue that there may be tax payable for a tax year under regulation 68 by an employer which has neither been—

(a) paid to the Inland Revenue, nor

(b) certified by the Inland Revenue under regulation 76, 77, 78 or 79.

(2) The Inland Revenue may determine the amount of that tax to the best of their judgment, and serve notice of their determination on the employer.

(3) …

(4) A determination under this regulation may—

(a) cover the tax payable by the employer under regulation 68 for any one or more tax periods in a tax year, and

(b) extend to the whole of that tax, or to such part of it as is payable in respect of—

(i) a class or classes of employees specified in the notice of determination (without naming the individual employees), or

(ii) one or more named employees specified in the notice.

(5) A determination under this regulation is subject to Parts 4, 5 (other than section 55) and 6 of TMA (assessment, appeals, collection and recovery) as if—

(a) the determination were an assessment, and

(b) the amount of tax determined were income tax charged on the employer,

and those Parts of that Act apply accordingly with any necessary modifications…."

94. The Appellant argues that a document can be a Regulation 80 determination even if it does not refer to Regulation 80. He took us to a number of documents.

95. The first is the document dated 22 May 2013 headed "Underpayment". It refers to income tax PAYE, NICs and Student Loan Deductions. It states that the payments for the year are less than the total due and gives details as set out in [32] above. It states "please pay the amount due now". There is no reference to any seven day notice period. This is not a Regulation 78 notice.

96. A letter dated 18 June from HMRC's Debt Management and Banking department attached a Statement of Liabilities and asked for immediate payment. The amount due of £31,674.73 included both PAYE and NICs.

97. The Time to Pay Agreement dated 1 July 2014 set out the amounts owing to HMRC broken down to £29,227.06 PAYE (including interest) and £45,045.83 VAT, again including interest. The total debt of £74,272.89 was to be paid by instalments of £2,063 a month starting on 15 July 2014.

98. A letter of 30 July 2013 from HMRC demanded payment of the £31,936.95 by 12 August 2013 and threatened distraint action against the Appellant if it failed to pay.

99. Mr Loftus submits that these documents clearly show that HMRC had made a decision that PAYE and NICs were due, they had quantified the amounts and notified this to the Appellant and this is sufficient to satisfy the requirements of Regulation 80. Accordingly, HMRC had made a decision which gives the Appellant a right of appeal under Regulation 80(5). As noted above, it is unclear when the Appellant first argued that the tax was not due, but HMRC have not taken any point on the appeal to them being late.

100. Ms Brown submitted that a valid Regulation 80 determination must refer to Regulation 80 and quote the legislation. She said that it would be in a similar format to the section 8 notices which refer to the legislation.

101. The section 8 decisions which were in the bundle make it clear they are a decision-they are headed "Notice of Decision"-but they do not refer to the legislation.

102. Ms Brown referred to a sample copy of a Regulation 80 notice. This is indeed headed "Notice of Regulation 80 Determination". Ms Brown submits that the determination must be in this form and as none had been issued, there was no appealable decision. When asked where the requirement for a reference to the legislation was set out, Ms Brown referred us back to Regulation 80.

103. Regulation 80 does not specify that the determination must be in any particular form. It cannot be made if a certificate has been issued under Regulation 78, but we have found that

no such certificate was issued. Regulation 80(2) provides that "The Inland Revenue may determine the amount of that tax [unpaid PAYE] to the best of their judgement, and serve notice of their determination on the employer".

104. In our view, it is sufficient if HMRC have decided how much PAYE income tax they consider to be due and unpaid and have told the employer of that decision. It is clear from the documents referred to in Mr Loftus' submissions that HMRC had decided there was unpaid tax, they had determined that amount of that tax and had notified the Appellant of that decision.

105. Accordingly, we find that HMRC had made a Regulation 80 determination which provides the Appellant with an appealable decision.

Was there a valid overpayment relief claim?

106. Our decision at [105] gives the Tribunal jurisdiction to hear the appeal, but we also consider the arguments about the overpayment relief claim under Schedule 1AB TMA. It is common ground that this is the correct provision.

107. Schedule 1AB TMA provides, so far as material:

> **"*Claim for relief for overpaid tax etc***
>
> 1 (1) This paragraph applies where—
>
> (a) a person has paid an amount by way of income tax or capital gains tax but the person believes that the tax was not due, or
>
> (b) a person has been assessed as liable to pay an amount by way of income tax or capital gains tax, or there has been a determination or direction to that effect, but the person believes that the tax is not due.
>
> (2) The person may make a claim to the Commissioners for repayment or discharge of the amount.
>
> (3) Paragraph 2 makes provision about cases in which the Commissioners are not liable to give effect to a claim under this Schedule.
>
> (4) Paragraphs 3 to 7 (and sections 42 to 43C and Schedule 1A) make further provision about making and giving effect to claims under this Schedule. …
> (6) The Commissioners are not liable to give relief in respect of a case described in subparagraph (1)(a) or (b) except as provided—
>
> (a) by this Schedule and Schedule 1A (following a claim under this paragraph), or
>
> (b) by or under another provision of the Income Tax Acts or an enactment relating to the taxation of capital gains.
>
> (7) For the purposes of this Schedule an amount paid by one person on behalf of another is treated as paid by the other person….
>
> ***Making a claim***
>
> 3 (1) A claim under this Schedule may not be made more than 4 years after the end of the relevant tax year.
>
> (2) …
>
> (3) In relation to a claim made in reliance on paragraph 1(1)(b), the relevant tax year is
>
> (a) …

(b) otherwise,] the tax year to which the assessment, determination or direction relates.

(4) A claim under this Schedule may not be made by being included in a return under section 8, 8A or 12AA of this Act. …

The claimant: one person accountable for amounts payable by another etc

4 (1) Sub-paragraph (2) applies where, under a relevant enactment, a person ("P") is accountable to the Commissioners for—

(a) an amount representing income tax or capital gains tax that is or is estimated to be payable by another person ("T"), or

(b) any other amount that, under a relevant enactment, has been or is to be set off against a liability of T.

(2) A claim under this Schedule in respect of the amount may be made only by T.

(3) Sub-paragraph (4) applies where—

(a) a person ("P") has paid an amount described in sub-paragraph (1)(a) or (b) in the belief that P was accountable to the Commissioners for the amount under a relevant enactment, but

(b) P was not so accountable.

(4) A claim under this Schedule in respect of the amount may be made only by P.

(5) The Commissioners are not liable to give effect to a claim under sub-paragraph (4) if or to the extent that the amount has been repaid to T or set against amounts payable to the Commissioners by T.

(6) "Relevant enactment" means—

(a) PAYE regulations,

(b) Chapter 3 of Part 3 of the Finance Act 2004 or regulations under that Chapter (construction industry scheme), or

(c) any other provision of or made under the Taxes Acts."

108. As Judge Mosedale pointed out, HMRC have refused an overpayment relief claim on several occasions. The question is whether the Appellant has made a valid, in time, claim for repayment of overpaid tax.

109. It has not been suggested that paragraph 2 applies to disallow the claim.

110. HMRC submit that the Appellant has not made a valid claim as this must be made in the manner set out in HMRC's "Employer Further Guide to PAYE and NICs" (CWG2 (2012)). This sets out detailed guidance on how an employer should operate PAYE and deduction of NICs. Ms Brown took us to Section 9 and the following sections of that document which related to mistakes in the amount of NICs or PAYE deducted during the year or after the end of the year.

111. First, these rules seem to apply where PAYE and NICs are properly deductible by the employer and the provisions referred to relate to correcting "mistakes". The Appellant's case is that the PAYE and NICs are not due, so CWG2 would not be relevant.

112. In any event, CWG2 is not statutory. It is HMRC's guidance. Schedule 1AB is of general application and in the present case we must consider whether its requirements have been satisfied. Paragraph 1(1)(a) of Schedule 1AB applies where a person has paid an amount

by way of income tax but the person believes the tax was not due. This is the Appellant's case. By paragraph 1(2), the person may make a claim to the Commissioners for repayment of the amount.

113. Under paragraph 3, a claim must be made within four years of the end of the relevant tax year. Paragraph 3(2) applies in the present case so that the "relevant" tax year is the year in respect of which the payment was made which is 2012/13. This means that a claim must be made, at the latest, by 5 April 2017.

114. In our view, the claim does not need to be in any particular form, but a claim must have been made and it must have been made by 5 April 2017.

115. Although the tax year in respect of which the payment is made determines the time limit for a claim, the timing of the payment is also important. Under paragraph 1, a claim may only be made where a person "has paid" an amount by way of income tax. If the tax has not yet been paid, it cannot have been overpaid and no claim can be made.

116. The first reference to a repayment claim was in Mr Gotch's letter of 7 August 2014. That letter said:

> "I and Mr Loftus look forward to hearing that on reflection you will agree not to pursue the element of Prisma's outstanding debt relating to PAYE & NIC and will consider the possibility of repaying any deductions so far paid over by Prisma relating to PAYE & NIC deducted incorrectly."

117. At that point, no payments had been made: the TTP arrangement did not begin until 15 July 2014. As mentioned at [38] the PAYE element of the debt would have been paid first and this would have been fully paid by September 2015. The Appellant must therefore have made a claim after that date, but before 5 April 2017.

118. We were not taken to any communication that specifically said the Appellant was making a new claim, but on reviewing the correspondence, it is clear that the Appellant regarded the original claim as ongoing.

(1) A meeting was arranged for HMRC to visit Prisma's premises on 22 January 2016. In an email confirming the meeting, Mr Loftus said "I will be on hand to discuss the specifics of the claim for £28k dating from Q1 2013."

(2) HMRC's written notes of the meeting record: "TL provided the background information for the repayment claim;- This is outlined in the attached papers headed 'Meeting Notes Prisma Recruitment Ltd and HMRC January 22 2016'. TL also referred HK [Mr Kuster of HMRC] to the letter from Tax Fellowship to HMRC dated 7 August 2014 that also details the reasons for PR's claim. This letter is attached to these notes of meeting for ease of reference.'". The attachments referred to were not included in the bundle.

(3) Mr Loftus sent an email to Mr Kuster agreeing the draft meeting notes subject to some corrections. He added at the end of that email:

> "It was said at the meeting but not recorded in the notes, that we do not see why this check is required so soon after the other one and we are frustrated that HMRC are only now embarking on an investigation into the issue surrounding our reclaim of PAYE, nearly three years after the event and eighteen months after the tax professional we engaged (at HMRC's insistence) reported his findings.
>
> Moreover, we would like to point out again that none of the questions and answers talked about during the meeting or written in the notes have any impact on the issue of that claim.

> … By April of this year the outstanding balance on our TTP agreement will equal **the amount we are now claiming**. We would therefore request that the when we reach that point the TTP is suspended until this matter is resolved." (emphasis added).

(4) Mr Kuster replied on 22 February 2016. The letter included an apology for the amount of time taken to address the reclaim of PAYE tax and NICs.

(5) On 10 March and 18 April 2016 Mr Kuster wrote letters headed "repayment claim" to Prisma to say that he was awaiting specialist advice on this matter.

(6) On 10 May 2016, Mr Kuster wrote to Prisma refusing the repayment claim. He stated that there is no right of appeal against the refusal which is clearly wrong.

(7) Mr Loftus requested a review in a letter of 19 May 2016. The review conclusion letter of 7 June 2016 upheld Mr Kuster's decision on the basis that HMRC did not agree the "excluded services" issue and so considered the PAYE and NICs were properly due.

119. Taking all this correspondence together, we are of the view that the original repayment claim, made in 2013, was an ongoing and repeated claim. In particular, Mr Loftus' email of 9 February 2016 refers to "the amount we are now claiming"- a clear reference to a current intention to make a current claim and one which was made within the time limit. We therefore decide that the Appellant has made an in time repayment claim under Schedule 1AB TMA.

120. The remaining point which needs to be addressed is whether paragraph 4 of Schedule 1AB prevents the Appellant making a claim. The legislation is set out above.

121. Ms Brown did not really address this point in the hearing, but HMRC's position was set out in their representations of 3 July 2019 in response to the Tribunal's letter of 5 June 2019. HMRC submitted that paragraph 4(3) did not apply because the Appellant was under a statutory obligation to account for the income tax under PAYE. They said:

> "Sub-paragraph (4) applies where–
>
> (a) a person ("P") has paid an amount described in sub-paragraph (1)(a) or (b) in the belief that P was accountable to the Commissioners for the amount under a relevant enactment, but
>
> (b) P was not so accountable.
>
> The respondents take the view that Paragraph 4(3) does not apply, inasmuch as with the person (P) being the appellant, there was a statutory obligation, and not a belief, for them to account for the income tax due on the PAYE income under the relevant enactment….
>
> The appellant made the appropriate deductions, as it was aware of its obligation as an employer to make from the PAYE income. For which it was statutorily recognised as a requirement to account for. Thusly the respondents submit the conditions in Paragraph 4(3) of Sch 1AB TMA are not met." (sic)

122. These submissions are not entirely clear but HMRC's position seems to be that the income tax was correctly paid and accounted for by the Appellant so that there was no overpayment and therefore they cannot reclaim the tax as it was properly paid. This still does not address paragraph 4, which deals with the situation where one person pays tax on behalf of another. We infer that HMRC are arguing that paragraph 4(1) applies, that is, as the tax was properly due, it was tax payable by the taxpayer and so only the taxpayer could make a

reclaim. In other words, as Prisma paid the PAYE tax on account of the workers' liability and not their own liability, **it** cannot make a claim for repayment of the tax.

123. The Appellant submits that, in accordance with paragraph 1(1) it has paid income tax but it believes the tax is not due. Mr Loftus submits that Prisma falls within paragraph 4(3) which applies where a person P has paid the tax in the belief that P was accountable for the tax but P was not so accountable. In this case, only P can make a claim. Again, the point was not fully argued, but Mr Loftus was essentially arguing that the workers were providing excluded services which meant that Prisma was not under any obligation to deduct PAYE. Therefore the tax which was paid was not paid on behalf of the workers, because there was no obligation to do so. No PAYE tax was in fact due and so Prisma had paid tax it was not liable to pay and the tax paid was its own money, so it was the "P" who could make the reclaim in accordance with paragraph 4(4).

124. Whether paragraph 4(1) or 4(3) applies depends on the outcome of the substantive appeal, that is, whether PAYE was or was not properly payable.

125. For the purposes of the jurisdiction issue, we have concluded that the Appellant made an in time claim for repayment, which means that the Tribunal has jurisdiction to hear the substantive appeal. We will consider how paragraph 4 applies when we consider the substantive arguments.

Conclusion on the jurisdiction issue

126. For the reasons set out above, we have concluded that HMRC did make a Regulation 80 determination which gave the Appellant an appealable decision and that the Appellant did make an in time repayment claim under Schedule 1AB TMA.

Was Prisma obliged to operate PAYE and deduct NICs from the payments to the workers?

127. We have set out the relevant legislation for both PAYE and NICs at [10] to [16] above.

128. It is common ground that the criteria for determining whether Prisma is required to make deductions are the same for PAYE and NICs. If the workers are providing "excluded services" for PAYE purposes, Prisma will not be obliged to operate PAYE and will also be exempted from deducting Class 1 NICs. It is also common ground that the contract between Prisma and the workers is an agency contract. The matters for determination are

(1) who is the client?; and

(2) were the services provided excluded services?

Who was Prisma's client?

129. Following ADR, the sole issue was the identity of the client although the identity of the client is critical in determining whether the services were excluded services. HMRC take the view the client was RBS. Prisma contends the client was BGM. In his submissions following ADR, Mr Loftus stated:

> "HMRC are disputing the workers are exempt by virtue of providing excluded services, on the single ground, that the client as identified in the contracts at the time, was not 'the client' for the purpose of the legislation (as it stood at the time). HMRC say that 'the client' in the legislation was one or more customers of Prisma's contracted client.
>
> The ADR process failed for this reason.
>
> **Where there is agreement (or not)**
>
> Prisma and HMRC are agreed that;-

> There was an agency contract.
>
> The thirteen individuals are the workers
>
> Prisma can be identified as the agency (a third person).
>
> If the identity of 'the client' is the contractual client… then the workers are exempt on the grounds of excluded services and Prisma's claim succeeds.
>
> HMRC and Prisma cannot agree:-
>
> If it is the contractual client (BGM) who is 'the client' in the legislation. Or if 'the client' referred to in the legislation is, as HMRC maintain, the Royal Bank of Scotland."

130. We have set out above our findings as to the contractual arrangements between the parties and the way in which the work was carried out. We have also considered the correspondence highlighted by HMRC referring to Prisma providing workers to RBS. We also accept Mr Loftus' submissions in relation to ADR that BGM charged its own consultancy fees to RBS based on project stage completion and did not re-bill the time worked by the workers directly to their client. We note that Mr Loftus' statement quoted at [129] above is consistent with HMRC's Statement of Case and Skeleton Argument where, as noted, they focus on the identity of the "client".

131. For the agency provisions to apply, the worker must personally provide, or be under an obligation personally to provide, services (which are not excluded services) to another person: "the client" and those services must be provided by or through a third person ("the agency") under the terms of an agency contract. An "agency contract" is defined by section 47(1) as

> "a contract made between the worker and the agency under the terms of which the worker is obliged to personally provide services to the client."

132. We must consider to whom the workers were obliged to provide their services on the basis of the contracts and other documents we have seen.

133. The only contracts were between Prisma and the workers on the one hand and Prisma and BGM on the other hand. We have found that there was no contract between Prisma and RBS. We have set out the terms of the contracts and the arrangements between the parties in some detail at [53] to [84] above.

134. BGM was a business providing consultancy services to its own clients. It was not a mere intermediary (employment business) or sub-agent of Prisma. It is quite clear from the contracts that Prisma was supplying the workers to BGM and the workers were obliged, under their contracts, personally to provide their services to BGM. It was for BGM to decide what projects the workers worked on. BGM was able to manage the workers and determine what they did and only BGM could authorise the time sheets on the basis of which the workers were paid. BGM incurred an obligation under the letter contract with Prisma to reimburse Prisma the amount of the remuneration paid to the worker. The contracts make no mention of RBS. Ms R could have been asked to work on a project for any of BGM's clients.

135. It is abundantly clear from RBS's letter to Mr Loftus of 1 October 2014 that RBS regarded its contractual relationship as being with BGM and not with Prisma or the workers. RBS stated that the transfer of staff (the workers) was under the control of BGM's Administrator [in the insolvency] and not RBS directly. The BGM staff did not report to RBS. BGM had its own reporting structures for its staff and RBS managed its relationship with BGM via regular reviews with BGM senior management and not the workers.

136. BGM contracted with RBS for the provision of consultancy services. Those services could physically be provided only by individuals who provided "services" to RBS only in the sense that a waiter serves a customer in a restaurant: they were the instruments by which BGM provided its consultancy services to RBS and the workers were obliged to provide their services to BGM.

137. We have no hesitation in finding that Prisma's client, for the purposes of section 44 of ITEPA was BGM.

138. We note that if the client was indeed RBS, section 44 could not apply as there was no "agency contract", which requires there to be a contract between the worker and Prisma under the terms of which the worker was obliged to personally provide services to RBS. There was no such contract.

Were the services excluded services?

139. Under section 47(2)(b), excluded services means:

> "(b) services provided **wholly** [and this is a strict test]-
>
> (i) In the worker's own home, or
>
> (ii) At other premises which are neither controlled or managed by the client nor prescribed by the nature of such services."

140. Although the workers may have worked some of the time from home, they did not work there all the time and, indeed, the basis of this case is that they worked all or most of their time at RBS premises.

141. The premises at which they did work, being RBS premises or their homes or coffee shops etc were clearly neither controlled or managed by BGM. Nor did the nature of the services dictate where they had to be carried out. We have found as a fact that the workers did no work at BGM premises, which satisfies the "wholly" requirement i.e. that the work was carried out wholly at premises which were not controlled or managed by BGM. HMRC seem to agree-see the extract from Mr Loftus' submissions at [129] where he said one of the points of agreement was that "If the identity of 'the client' is the contractual client… then the workers are exempt on the grounds of excluded services and Prisma's claim succeeds."

142. We therefore conclude that the services provided by the workers were excluded services and Prisma was under no obligation to deduct income tax or NICs from the workers' remuneration.

Conclusion on the PAYE/NICs issue

143. We have found that HMRC did make a Regulation 80 determination which the Appellant has appealed. HMRC made a Section 8 decision in respect of each of the workers and the Appellant appealed against those decisions. We have also found that the Appellant made a valid, in time, overpayment relief claim under schedule 1AB TMA.

144. As we have decided that Prisma was under no obligation to deduct income tax, the circumstances fall within paragraph 4(3) of schedule 1AB: Prisma has paid income tax to HMRC believing it was accountable for the tax, but it was not so accountable and is therefore entitled to reclaim the amount paid. The wrongly paid tax was not paid on account of the workers' liability and so paragraph 4(1) does not apply. This was Prisma's money, not that of the workers and Prisma is entitled to a repayment.

145. We allow Prisma's appeals against the Regulation 80 determination and the Section 8 decisions and we allow the overpayment relief claim. Accordingly, HMRC must repay to the

Appellant the amount of income tax and primary and secondary Class 1NICs which it wrongly paid.

THE VAT APPEAL

The facts

146. For each of the VAT periods from 06/16 to 06/17 inclusive (the relevant quarters), the Appellant was late paying some of its VAT. It had been in the default surcharge regime since the 09/15 VAT quarter. HMRC had charged the Appellant VAT default surcharges for the relevant quarters under section 59 of the Value Added Tax Act 1994 (VATA), at the rate of 10% and 15%.

147. The VAT default surcharge amounts for the relevant quarters total £11,250.

148. In each quarter, the Appellant paid some, and often most, of the VAT due by the due date. Some of the VAT, ranging in amount from £2,000 to £21,000 was paid after the due date.

149. The Appellant did not contact HMRC to discuss a time to pay agreement in relation to the relevant quarters. As noted above, a TTP agreement was negotiated in 2014 in the aftermath of BGM's collapse.

150. The Appellant initially appealed to HMRC against the surcharges. HMRC refused the appeal. Following a review, on 3 November 2017 the original decision was upheld and the Appellant appealed to the Tribunal on 27 November 2017.

151. The Appellant does not dispute any of these facts, but contends that the company had a reasonable excuse for the late payment.

152. HMRC took us to various well known cases on the question of reasonable excuse including:

(1) *Rowland v R & C Commrs* (2006) SpC548, which indicates that the Tribunal had to take account of all the circumstances.

(2) *The Clean Car Co Ltd* [1991] BVC 568 which explains that the test is an objective test and that one has to take account of the attributes of the taxpayer; and

(3) *Perrin v Revenue and Customs Commissioners* [2018] BTC 513 in which the Upper Tribunal provided guidance on the approach to be taken in considering a reasonable excuse.

153. We have taken these cases, and the others referred to by HMRC, into account but we do not need to set out the decisions in any detail.

The parties' submissions

154. Section 59(7)(b) VATA provides that a taxpayer who has a reasonable excuse for the late payment is not subject to the default surcharge. Section 71(1)(a) VATA provides that "an insufficiency of funds to pay any VAT due is not a reasonable excuse". The Appellant argues that the principle in the case of *Customs and Excise Commissioners v Steptoe* [1992] BVC 142 applies. That is, whilst an insufficiency of funds cannot itself be a reasonable excuse, the underlying cause of the insufficiency may provide a reasonable excuse.

155. Mr Loftus argues that the Appellant's shortage of working capital to fund VAT payments was in part a result of HMRC's own actions. In particular, the Appellant paid HMRC the income tax and NICs which it believed were not due, in addition to spending money on Mr Gotch's opinion. The length of time which it took HMRC to address these

issues left the Appellant out of pocket and was the underlying cause of the cash flow problems which prevented it from paying all the VAT on time.

156. Ms Brown contends that the Appellant has had recurrent cash flow problems and has previously been in the default surcharge regime and has previously had TTP agreements (other than the 2014 agreement). HMRC cancelled a default surcharge for the 03/13 quarter, immediately following BGM's collapse, accepting that this was a valid underlying cause of insufficiency of funds on that occasion.

157. However, the BGM insolvency occurred between three and four years before the defaults in the relevant quarters and can no longer be relied on to provide a reasonable excuse.

158. She argues that the Appellant's cash flow difficulties in the relevant quarters are no more than the normal hazards of trade and that it does not have a reasonable excuse.

Discussion of reasonable excuse

159. We acknowledge that the Appellant tried to meet its VAT obligations to the extent it could and that it paid substantial amounts of its VAT liability by the due date.

160. The Appellant does not seek to argue that the insolvency of BGM caused the cash flow difficulties in the relevant quarters. The Appellant's argument is that had HMRC addressed the dispute over the income tax and NICs in a timely fashion (and presumably agreed with the Appellant and repaid the money), the VAT problem would not have arisen. Mr Loftus argues that Prisma's ability to pay the VAT was contingent on the PAYE/NIC matters and that the shortfall in the VAT payments never exceeded the PAYE and NIC amounts at any time: the PAYE/NICs reclaimed was over £28,000 and the largest single VAT shortfall was £26,000.

161. We are unable to accept Mr Loftus' arguments. Prisma did not, in fact, pay the full £28,199.21 PAYE/Class 1 primary NICs as a lump sum. This amount, and the VAT outstanding was the subject of the time to pay agreement of 1 July 2014. The Appellant was paying £2,063 a month between July 2014 and July 2017. Except in one quarter, the VAT shortfall was considerably more than £2,063.

162. We find that the Appellant's cash flow difficulties during the relevant quarters were no more than the normal hazards of trade. We do not accept that Prisma's dispute with HMRC about the PAYE/NICs was the underlying cause of the insufficiency of funds. The reason for the late payment was simply insufficiency of funds and that is not capable of providing a reasonable excuse.

163. Accordingly we have decided that the Appellant had no reasonable excuse for the late payment of VAT.

DECISION

164. For the reasons set out above we have decided that:

(1) HMRC made a Regulation 80 determination

(2) the Appellant made a valid overpayment relief claim; and

(3) the services provided by the workers were excluded services.

165. Accordingly, the Appellant was under no obligation to pay the income tax and NICs which it did in fact pay.

166. We therefore allow the appeals in relation to income tax and NICs and direct that the overpaid tax and NICs shall be refunded to the Appellant

167. For the reasons set out above we have decided that the Appellant made late payments of VAT for the relevant quarters, but did not have a reasonable excuse for doing so.

168. Accordingly we dismiss the appeal against the VAT default surcharges.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

169. 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.

MARILYN MCKEEVER
TRIBUNAL JUDGE

Release date: 14th MARCH 2023