



Appeal number: UT/2021/00059

INCOME TAX- construction industry scheme – whether FTT erred in deciding withdrawal of Gross Payment Status eight years after compliance failures was disproportionate – ss 66, 67 Finance Act 2004

**UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER**

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

Appellants

- and -

RMF CONSTRUCTION SERVICES LIMITED

Respondent

**TRIBUNAL: The Hon. Mr Justice Fancourt
Judge Timothy Herrington**

Sitting in public by way of remote video Microsoft Teams hearing, treated as taking place in London, on 19 January 2022

Bayo Randle, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

The Respondent in person through Steve Bache, Financial Controller

DECISION

Introduction

1. This is the appeal of the appellants (“HMRC”) from the decision (“the Decision”) of the First-tier Tribunal (“FTT”) (Judge Philip Gillett) released on 15 January 2021. The FTT allowed the appeal of the Respondent (“RMF”) against HMRC’s decision to cancel RMF’s gross payment status under the Construction Industry Scheme (“Gross Payment Status”). Gross Payment Status means that a contractor may pay its sub-contractor in full without deducting part of what is due and paying it instead to the Revenue on account of the sub-contractor’s liability to tax.

2. The basis of HMRC’s decision was that RMF had failed to comply with its Tax and National Insurance contributions obligations under s66(1) Finance Act 2004 (“FA 2004”), in particular in respect of the late filing of its corporation tax return for the accounting period ending 31 July 2010 and the late payment of RMF’s corporation tax liability for the period ended 31 March 2013. This should have been paid on 1 January 2014 but was not in fact paid until September 2014.

3. At the request of HMRC, RMF’s appeal to the FTT appeal was stayed for some years behind the lead case of *JP Whitter (Water Well Engineers) Ltd v HMRC* [2018] STC 1394 (“*Whitter*”). This was finally decided by the Supreme Court in a judgment given on 13 June 2018.

4. The FTT decided that withdrawal of RMF’s Gross Payment Status over eight years after its failure to file its corporation tax return on time, together with other minor infringements, would be totally disproportionate. The FTT said at [8] of the Decision that the objective of the Construction Industry Scheme (“CIS”), i.e., the enforcement of compliance, has been achieved by the mere threat of the withdrawal of Gross Payment Status and to carry through on that threat by withdrawing gross status now, when RMF has been fully compliant since that time, would serve no useful purpose whatsoever and is therefore disproportionate.

5. HMRC now appeals to this Tribunal with the permission of the FTT. HMRC contend that the FTT (i) misunderstood the limits of its jurisdiction and the nature of its review function (ii) misapplied the proportionality test and (iii) relied on impermissible factors when determining that withdrawal of Gross Payment Status was disproportionate.

The Law

6. The requirements for registration for Gross Payment Status under the CIS are set out in s 64 FA 2004 which provides so far as relevant as follows:

“(1) This section sets out the requirements (in addition to that in subsection (1) of section 63) for an applicant to be registered for gross payment.

...

(4) Where the application is for the registration for gross payment of a company (otherwise than as a partner in a firm)—

(a) the company must satisfy the conditions in Part 3 of Schedule 11 to this Act, and

(b) if the Board of Inland Revenue have given a direction under subsection (5), each of the persons to whom any of the conditions in Part 1 of that Schedule applies in accordance with the direction must satisfy the conditions which so apply to him.

(5) Where the applicant is a company, the Board may direct that the conditions in Part 1 of Schedule 11 to this Act or such of them as are specified in the direction shall apply to—

(a) the directors of the company,

(b) if the company is a close company, the persons who are the beneficial owners of shares in the company, or

(c) such of those directors or persons as are so specified,

as if each of them were an applicant for registration for gross payment.

...”

7. Section 66 FA 2004 sets out the circumstances in which registration for gross status may be withdrawn as follows:

“(1) The Board of Inland Revenue may at any time make a determination cancelling a person’s registration for gross payment if it appears to them that—

(a) if an application to register the person for gross payment were to be made at that time, the Board would refuse so to register him,

(b) he has made an incorrect return or provided incorrect information (whether as a contractor or as a sub-contractor) under any provision of this Chapter or of regulations made under it, or

(c) he has failed to comply (whether as a contractor or as a sub-contractor) with any such provision.

(2) Where the Board make a determination under subsection (1), the person’s registration for gross payment is cancelled with effect from the end of a prescribed period after the making of the determination (but see section 67(5)).

(3) The Board of Inland Revenue may at any time make a determination cancelling a person’s registration for gross payment if they have reasonable grounds to suspect that the person—

- (a) became registered for gross payment on the basis of information which was false,
 - (b) has fraudulently made an incorrect return or provided incorrect information (whether as a contractor or as a sub-contractor) under any provision of this Chapter or of regulations made under it, or
 - (c) has knowingly failed to comply (whether as a contractor or as a sub-contractor) with any such provision.
- (4) Where the Board make a determination under subsection (3), the person's registration for gross payment is cancelled with immediate effect.
- (5) On making a determination under this section cancelling a person's registration for gross payment, the Board must without delay give the person notice stating the reasons for the cancellation.
- (6) Where a person's registration for gross payment is cancelled by virtue of a determination under subsection (1), the person must be registered for payment under deduction.
- (7) Where a person's registration for gross payment is cancelled by virtue of a determination under subsection (3), the person may, if the Board thinks fit, be registered for payment under deduction.
- (8) A person whose registration for gross payment is cancelled under this section may not, within the period of one year after the cancellation takes effect (see subsections (2) and (4) and section 67(5)), apply for registration for gross payment.
- (9) In this section "a prescribed period" means a period prescribed by regulations made by the Board."

8. The conditions for registration are contained in Schedule 11 to FA 2004 and, in particular, what is referred to as the compliance test, for companies, is set out in paragraph 12 of that Schedule which (until 5 April 2016) provided, so far as relevant, as follows:

"(1) The company must, subject to sub-paragraphs (2) and (3), have complied with—

- (a) all obligations imposed on it in the qualifying period (see paragraph 14) by or under the Tax Acts or the Taxes Management Act 1970 (c. 9); and
- (b) all requests made in the qualifying period to supply to the Inland Revenue accounts of, or other information about, its business.

...

(3) A company that has failed to comply with such an obligation or request as is referred to in sub-paragraph (1) is to be treated as satisfying the condition in

that sub-paragraph as regards that obligation or request if the Board of Inland Revenue are of the opinion that—

- (a) the company had a reasonable excuse for the failure to comply, and
- (b) if the excuse ceased, it complied with the obligation or request without unreasonable delay after the excuse had ceased.

...”

9. Section 67 FA 2004 makes provision for a person aggrieved by the cancellation of his registration for gross payment to appeal to the FTT. Section 67 (4) – (5) provide as follows:

“(4) The jurisdiction of the tribunal on such an appeal that is notified to the tribunal shall include jurisdiction to review any relevant decision taken by the Board of Inland Revenue in the exercise of their functions under section 63, 64, 65 or 66.

(5) Where a person appeals against the cancellation of his registration for gross payment by virtue of a determination under section 66(1), the cancellation of his registration does not take effect until whichever is the latest of the following—

- (a) the abandonment of the appeal,
- (b) the determination of the appeal by the tribunal or,
- (c) or more the determination of the appeal by the Upper Tribunal or a court.”

10. Thus, in this case, the cancellation of RMF’s registration has not taken effect because the determination of its appeal was stayed pending the final judgment in *Whitter* and is yet to be determined by this Tribunal.

11. In *Whitter*, an important point of principle as regards the power of HMRC to cancel the registration of a taxpayer for gross payment under the CIS was established. The question was whether, before exercising the power of cancellation conferred by s66 (1) FA 2004, HMRC are obliged, or at least entitled, to take into account the impact on the taxpayer’s business of the cancellation of its registration for gross payment.

12. At [3] of the Court of Appeal’s judgment in that case ([2017] STC 149), Henderson LJ quoted the following passage at [2] to [5] of the judgment of Ferris J in *Shaw v Vicky Construction Ltd* [2002] STC 1544, which described the background to the legislation governing the CIS, and the advantages to a sub-contractor of being registered for gross payment:

"2. Vicky is engaged in the construction industry. In the course of its business it does work in that field as a sub-contractor engaged by another company (the contractor).

3. In the absence of the statutory provision with which this appeal is concerned Vicky would be entitled, like any other sub-contractor, to be paid the contract price in accordance with its contract with the contractor without

any deduction in respect of its own tax liability. However it became notorious that many sub-contractors engaged in the construction industry "disappeared" without settling their tax liabilities, with a consequential loss of revenue to the exchequer.

4. In order to remedy this abuse Parliament has enacted legislation, which goes back to the early 1970s, under which a contractor is obliged, except in the case of a sub-contractor who holds a relevant certificate, to deduct and pay over to the Revenue a proportion of all payments made to the sub-contractor in respect of the labour content of any sub-contract. The amount so deducted and paid over is, in due course, allowed as a credit against the sub-contractor's liability to the Revenue.

5. The need to make and pay over such deductions can be an irritation to the contractor obliged to carry out this exercise. It also adversely affects the cash flow of the sub-contractor. Accordingly it is advantageous to a sub-contractor to have a statutory certificate rendering such a deduction unnecessary. The provision of such a certificate tends to make the sub-contractor holding the certificate a more attractive party for the contractor to deal with and, by enabling the sub-contractor to receive the contract price without deduction, improves the sub-contractor's cash flow."

13. Against that background, Henderson LJ rejected the taxpayer's argument that, in considering whether to exercise its discretion to cancel a taxpayer's registration under the CIS where there had been compliance failures, HMRC should be able to take into account the impact of cancellation on the taxpayer's business. He said this at [60]:

"As a matter of first impression, I cannot find any indication in this tightly constructed statutory scheme that Parliament intended HMRC to have the power, and still less a duty, to take into account matters extraneous to the CIS regime, when deciding whether or not to exercise the power of cancellation in section 66(1). By "matters extraneous to the CIS regime" I mean in particular, in the present context, matters which do not relate, directly or indirectly, to the requirements for registration for gross payment, and to the objective of securing compliance with those requirements. My preliminary view, therefore, is that consideration of the financial impact on the taxpayer of cancellation would fall well outside the intended scope of the power."

14. Having considered the taxpayer's arguments to the contrary, he confirmed his preliminary view. He said at [67] that, subject to proportionality issues:

"...on its true construction s 66 (1) neither authorises nor requires HMRC to take into account the likely impact on the taxpayer's business and financial position when deciding whether or not to exercise their power to cancel registration for gross payment."

15. Henderson LJ then considered the question of proportionality. He decided that insofar as the common law requirement of proportionality was applicable it did not assist in this case. He said this at [71] and [72]:

“71. ... The CIS legislation as a whole is clearly proportionate in the balance which it strikes between ends and means, and in the procedural safeguards for the taxpayer which are built into it. In relation to the power of revocation in section 66(1) itself, the existence of a discretion is one of those safeguards, and it seems to me that any common law requirement of proportionality is comfortably satisfied if the matters which HMRC are entitled to take into account are broadly confined to matters relevant under the statutory scheme to the grant of registration for gross payment, but with a wider margin of discretion than the often highly prescriptive terms of the legislation would otherwise permit.

72. The impact of cancellation of registration on the sub-contractor's business is in my judgment an extraneous factor, and the mere fact that the financial consequences for the sub-contractor's business will be severe cannot, without more, make that factor one which it is relevant for HMRC to consider. Gross registration is a privilege which has to be earned by satisfying various conditions, and which is liable to be lost if those conditions are no longer satisfied. The compliance conditions are all matters within the control of the taxpayer, and the consequences of non-compliance are clearly spelt out in the legislation. The taxpayer's simple remedy is to ensure that it continues to comply with the relevant conditions, and in most cases it will have nobody to blame but itself if its registration for gross payment is cancelled. That is certainly so in the present case, where the Company failed to put in place a system which would ensure timely payment of its PAYE obligations, despite being given two opportunities to do so. Against such a background, it would to my mind be strange if the common law were to subject exercise of the section 66(1) power to a wider requirement of proportionality, requiring a detailed examination of the taxpayer's present and probable future financial position in the event of cancellation.”

16. Likewise, Henderson LJ rejected an argument that HMRC had failed to exercise their discretion proportionately as a matter of human rights law. The taxpayer had submitted that an interference with the company's possessions under A1P1 must be proportionate in that there had to be a reasonable relation proportionality between the means employed and the aims sought to be realised by the legislation.

17. At [79] Henderson LJ accepted that A1P1 had to be considered at the stage of exercise of the discretion conferred by s 66 (1) FA 2004 because the cancellation of registration indubitably involves an interference with possessions. However, he went on to say:

“It by no means follows, however, that the proportionality review at this stage always needs to go beyond the proportionality of the CIS regime as a whole. On the contrary, in all save the most exceptional cases it will in my judgment be a complete answer that the discretion as I have construed it forms an integral part of a Convention-compliant statutory regime. And in the circumstances of the present case, I see no more scope for a successful argument based on A1P1, as a ground of challenge to the cancellation of the Company's registration, than I do for a challenge based on the common law principle of proportionality. In particular, the adverse effect on the Company's business is in my view an entirely predictable consequence of the Company's non-compliance, for which it has only itself to blame.”

18. He concluded at [80]:

“Accordingly, although I would not rule out the possibility of exceptional circumstances justifying a wider proportionality review at the stage of exercise of the power of cancellation, I do not consider that the impact on the Company's business, as found by the FTT, comes near to satisfying such a test. Given the practical and cash-flow advantages of registration for gross payment, it is always probable that cancellation of the registration will seriously affect the taxpayer's business. Far from being exceptional, such consequences are likely to be the norm, and taxpayers must be taken to be well aware of the risks to their business which cancellation will bring. In individual cases, of which this may perhaps be one, the result may seem harsh; but a degree of harshness in a regime which is designed to counter tax evasion, and where continued compliance is within the power of the sub-contractor, cannot in my view be characterised as disproportionate. Both deterrence, and ease of compliance, are important factors which help to make the CIS scheme as a whole clearly compliant with AIP1....”

19. The Supreme Court dismissed the taxpayer's appeal. At [14] Lord Carnwath, who gave the judgment of the court, approved Henderson LJ's approach which he said was encapsulated at [60] of Henderson LJ's judgment set out at [13] above.

20. Lord Carnwath said that the Court of Appeal were right to hold that any interference with the taxpayer's possessions was proportionate. He said at [23] that once it is accepted that the statute does not in itself require the consideration of the impact on the individual taxpayer, there is nothing in AIP1 which would justify the court in reading in such a requirement.

21. It is therefore clear from these judgments that the proportionality of any decision of HMRC to cancel the taxpayer's registration under the CIS must be measured by reference to the compliance requirements of the scheme itself rather than any extraneous factors which impact upon the individual taxpayer.

The Decision

22. References to numbered paragraphs in parentheses, [xx], unless stated otherwise, are references to paragraphs in the Decision.

23. The FTT found at [13] that HMRC had identified three compliance failures relating to RMF's tax affairs during the period from 2 September 2010 to 2 September 2011. As found by the FTT at [16], HMRC wrote to RMF's agent on 16 November 2011 stating that it was not accepted that RMF had a reasonable excuse for the failure to submit its corporation tax return for the period ended 31 July 2010, which was due on 31 July 2011, and accordingly that RMF's Gross Payment Status had been withdrawn.

24. RMF appealed against the decision to withdraw the Gross Payment Status, which was refused on 24 August 2012, HMRC noting five other failures during the period following the review, from September 2011 to August 2012. These involved further corporation tax returns: see [19] and [20]. HMRC's refusal was upheld on review. Amongst the reasons given for this refusal was that the failure to deliver the 2010

corporation tax return continued for a period of over 14 months without reasonable excuse and that there were compliance failures which continued, and new failures that arose, after HMRC identified the initial failings in September 2011: see [21].

25. On 6 December 2012 RMF appealed to the FTT, which subsequently directed that the matter should be stood behind *Whitter*: see [22] and [23].

26. At [38] the FTT set out [60] of Henderson LJ's judgment in *Whitter*, as set out at [11] above. The FTT acknowledged at [39] that HMRC have no obligation, nor indeed any ability, to take into account the financial consequences of the withdrawal of gross status. However, the FTT then went on to say at [40] to [43]:

“40. However, I consider that this tribunal should be able to consider whether or not the “punishment” of withdrawing gross status would be proportionate, considering the significant lapse of time since the “offence” of non-compliance was committed.

41. Following the various failures in 2011 and 2012 it has, apart from a very minor failing a few years ago, fulfilled all its obligations under the Taxes Acts.

42. The withdrawal of gross status at this time would therefore serve no useful purpose whatsoever and may even result in the commercial failure of the company, with the significant loss of jobs which that would entail. In addition, it would be able to reapply for Gross Status immediately, which, in accordance with the normal rules, would be granted. Thus the effect of withdrawing Gross Status at this time would cause additional administrative work, for both the company and HMRC, but would serve no further purpose.

43. The objective of the compliance regime for the CIS is to encourage compliance. It is not its purpose to punish non-compliance. This objective has already been achieved by the mere threat of withdrawal of gross status. The company has successfully complied with its obligations for a number of years.”

27. At [48] the FTT reiterated its view that the objective of the CIS is to ensure compliance and not to impose a penalty for non-compliance. It concluded at [49]:

“In my view, the withdrawal of CIS gross status over eight years after the relevant offences would be totally disproportionate. The objective of the scheme, ie, the enforcement of compliance, has been achieved by the mere threat of the withdrawal of gross status and to carry through on that threat by withdrawing gross status, when the company has been fully compliant since that time would serve no purpose whatsoever and is therefore, in my view, disproportionate.”

Grounds of Appeal

28. HMRC were granted permission to appeal on the following three grounds:

Ground 1: The FTT misunderstood the limits of its jurisdiction and the nature of its review function.

HMRC contend that the FTT's power to review the decision made by HMRC is limited to a review of the decision as at the time it was made. There is no basis for reading into the legislation a power to take into account changes in circumstances that take place subsequently.

Ground 2: The FTT misapplied the proportionality test.

HMRC contend that the FTT failed to acknowledge that in the context of the application of a statutory regime, it is only in exceptional cases that it is appropriate to look beyond the proportionality of the regime as a whole and assess individual decisions for proportionality. The FTT did not consider any of the relevant sections of the Court of Appeal's judgment in *Whitter*, which made it clear that the CIS compliance regime as a whole comfortably satisfies the proportionality test; and that it is only in the most exceptional cases that one can justify a proportionality review at the stage of exercise of the power of cancellation.

Ground 3: the FTT relied on impermissible factors when determining that withdrawal Gross Payment Status was disproportionate.

HMRC contend that the FTT made an error of law in taking into account the risk of commercial failure of RMF and the additional administrative work caused by a withdrawal of Gross Payment Status. Those were matters extraneous to the CIS regime which, as confirmed in *Whitter*, were not to be taken into account by HMRC when making its decision. The FTT was also wrong in considering that RMF could immediately re-apply for Gross Payment Status.

29. RMF support the Decision for the reasons the FTT gave in allowing its appeal. It submits that it would be grossly unfair for RMF to lose its Gross Payment Status so long after the event and so long after making changes to improve its systems and comply with the legislation.

Discussion

30. Before turning to the specific grounds of appeal we make some general points regarding the structure of the legislation and how it has been applied in this case.

31. As is clear from what was said in *Whitter*, the objective of the CIS is that only those taxpayers carrying on business in the construction industry who can demonstrate that they are in compliance with their tax and reporting obligations can obtain the privilege of Gross Payment Status. If a taxpayer is unable to demonstrate that to be the case, then unless they can demonstrate a reasonable excuse for the non-compliance they cannot be registered. Likewise, if they fail to continue to comply in full with the relevant obligations after registration, then they are liable to lose that registration, unless again they are able to demonstrate a reasonable excuse for their failure or if HMRC exercise their discretion not to cancel the registration, which typically may happen if the failure is minor or insignificant.

32. The relevant provisions of FA 2004 therefore advance the objective of securing compliance by the taxpayer with the relevant tax and reporting obligations, thus

minimising the risk of tax evasion which had been a widespread problem in the construction industry before the CIS was introduced.

33. As Henderson LJ said at [80] of *Whitter*, cancellation of registration where there is a compliance failure is not exceptional and is the norm; taxpayers must be taken to be well aware of the risks to their business that cancellation will bring. The harshness of the regime is justified because of the need to stem the prevalence of tax evasion in the construction industry.

34. However, there is a further objective, namely deterrence, which was also mentioned by Henderson LJ at [80] of *Whitter*. This is achieved through the provisions of s 66 (8) FA 2004 which prevent a taxpayer whose registration has been cancelled from applying again for registration for a period of one year after the registration has been cancelled. If a taxpayer is at risk of being required to carry on business without the benefit of Gross Payment Status for a year, it is likely to have a serious deterrent effect. That period also gives sufficient time for a taxpayer to deal with any outstanding compliance failures and be able to satisfy HMRC that its compliance with the relevant obligations has continued for a significant period.

35. In this particular case, we have some sympathy with the position that RMF finds itself in. It made its appeal on the basis that withdrawal of Gross Payment Status would be extremely damaging to its business but then had to wait (in common with many other cases) some years before its appeal could be determined as it was, in common with many others, stayed until *Whitter* had been finally determined.

36. RMF now takes no issue with HMRC's decision to cancel its registration back in 2012 on the basis of its compliance failures, which were not insignificant and had continued for a considerable period of time. However, RMF says it is now able to demonstrate that it is fully compliant with its obligations and meets the requirements for registration and that has been the case for some time. We do not understand HMRC to dispute that position.

37. HMRC's decision to cancel RMF's registration has not yet taken effect because of the provisions of s 67 (5) FA 2004, as set out at [9] above. They will take effect if we determine this appeal in favour of HMRC, subject to any further appeal.

38. Unusually, RMF has been able to continue to operate with the benefit of Gross Payment Status for some years without, it said, any further compliance failures. It is for that reason that the FTT took the view that cancelling RMF's registration would serve no useful purpose and that it would be disproportionate to cancel it. In so doing, the FTT in effect disapplied the provisions of s 66 (8) and HMRC contend that it had no jurisdiction to do so.

39. Against that background, we turn to HMRC's grounds of appeal.

Ground 1 – the FTT exceeded its jurisdiction

40. As Mr Randle, who appeared for HMRC, submitted, the power being challenged by RMF is the power in s66(1) FA 2004 to make a determination cancelling a person's registration for gross payment. Therefore, any appeal must focus on whether that determination has been correctly arrived at. There is nothing in that provision that suggests that the FTT has power to take into account changes in circumstances that arise subsequent to the making of the determination. If that was intended to be the case, it would have been expected that there would be a specific provision indicating that the FTT could on appeal take into account any matters arising since the date of HMRC's decision.

41. That conclusion is reinforced by the wording of s 67 (4) FA 2004, which limits the jurisdiction of the FTT to "review any relevant decision taken by [HMRC] in the exercise of their functions under ...s 66". Under s 67 an appeal must be made within 30 days of the cancellation of the Gross Payment Status and that appeal must set out the reasons why the registration should not have been cancelled. This makes it clear that the reasons for the appeal must be based on the decision to cancel the registration as at the time it was made.

42. As we have stated above, RMF's grounds of appeal were based on the effect that the cancellation would have on its business. It now accepts that at the time of its decision, HMRC had grounds to cancel registration and RMF's grounds of appeal fell away once *Whitter* had been decided.

43. The FTT decided the appeal on the basis of the papers, without a hearing. In that context, RMF put in further submissions after the stay on the appeal was lifted which in effect set out new grounds of appeal based on its contention that withdrawal of Gross Payment Status 8 years after the relevant events was inappropriate, even though it accepted that the outcome of the review in 2012 was "technically correct". It does not appear that the FTT, as it should have done, asked HMRC for its response to those submissions.

44. The FTT answered the wrong question in determining the appeal. It said that the relevant question was whether or not the withdrawal of Gross Payment Status 8 years after the initial decision was disproportionate. However, the relevant question was whether HMRC's decision was justified as at the time that it was made. The fact that there was a long delay before the appeal was heard, unfortunate though that now appears to be for RMF, is irrelevant to the question that the FTT had to determine.

45. We also accept Mr Randle's submission that the legislation was intended to operate in such a way that in those cases where Gross Payment Status has rightly been withdrawn by HMRC all persons are treated in effectively the same way, whether or not they choose to appeal. As we have noted, s 66 (8) provides that when Gross Payment Status is cancelled a person cannot re-apply for a year after cancellation takes effect. So, although those that have unsuccessfully appealed a s.66 (1) cancellation will retain their Gross Payment Status until they have exhausted any appeals, they will nonetheless

lose that status for a minimum of one year before they can re-apply. The same is true of those whose who choose not to appeal.

46. As Mr Randle submitted, if appellants whose registration was cancelled under s. 66 (1) were entitled to take into account matters that took place after the withdrawal decision for the purposes of their appeals, this would position them at a significant advantage compared to similarly non-compliant taxpayers who did not appeal. It is unfortunate in this case that the one year period will, if HMRC's appeal is allowed, commence many years after the event, during which period the taxpayer appears to have been fully compliant, but that appears to us to be the inevitable effect of the strict wording of the legislation. It is also consistent with the purpose of the CIS to deter non-compliance, as we have set out above. If the FTT were correct, a non-complaint person who exhausted all their appeal rights and began a pattern of compliance while the case was under appeal would not lose their Gross Payment Status regardless of whether or not HMRC's decision at the time it was taken was correct or proportionate. As submitted by Mr Randle, that was clearly not the intended effect of the legislative regime.

47. We therefore conclude that HMRC have made out their case on Ground 1. That is sufficient for us to allow this appeal, but we will deal with the other Grounds briefly.

Ground 2: whether the FTT misapplied the proportionality test

48. As was made clear in *Whitter*, the CIS as a whole is to be regarded as proportionate, including the provision which requires there to be a lapse of a period of one year before a person whose registration is cancelled may reapply. It was made clear at [79] of Henderson LJ's judgment that it would only be in very exceptional circumstances that it would be necessary to review an individual decision on grounds of proportionality.

49. The FTT did not appear to consider the relevant passages of *Whitter* referred to at [12] to [20] above in coming to its decision that HMRC's decision in this case was disproportionate.

50. Even if (contrary to our findings above) the FTT was entitled to consider proportionality as at the time of its own decision, it does not appear that RMF's position is wholly exceptional, such as to justify the exercise of discretion in its favour. The fact that it became compliant following the decision to withdraw its registration is likely to be the case with many other taxpayers who have their registration withdrawn, and all such taxpayers will suffer the harm caused by losing their Gross Payment Status for at least a year. But that does not create an exceptional reason why the provisions of s 66(8) should not apply. Likewise, in agreement with HMRC, in our view the mere passage of time does not make a case exceptional. It was also the case in *Whitter*. In common with other taxpayers who had their registration withdrawn, RMF was able to retain its Gross Payment Status throughout the appeal period. As we have said, the length of time in this case was unusual, but RMF were ultimately in exactly the same position as all other unsuccessful appellants – they will be subject to a one-year period starting at the end of the appeal process during which they are unable to re-apply for registration.

51. It would appear that the FTT had overlooked the provisions of s 66 (8) in coming to its conclusion that withdrawal of RMF’s Gross Payment Status would serve no useful purpose. It stated, wrongly, at [42] of the Decision that RMF would be able to reapply for Gross Payment Status “immediately” and that it would be granted. The FTT therefore failed to consider the effect and deterrence objective of s 66 (8). It wrongly stated at [48] that the objective of the CIS was to ensure compliance, not to impose a penalty for non-compliance. We agree with HMRC that the deterrence objective is liable to be undermined if a taxpayer was able to avoid cancellation by subsequent compliance during the course of any appeal.

52. We therefore conclude that HMRC have made out its case on Ground 2.

Ground 3: whether the FTT relied on impermissible factors in deciding the cancellation was disproportionate

53. We agree with HMRC that the FTT was in error in taking into account, as it did at [42] of the Decision, the risk of the commercial failure of RMF and the additional administrative work that would be caused by a withdrawal of Gross Payment Status. Despite setting out at [38] of the Decision the passage from [60] of Henderson LJ’s judgment in *Whitter* to the effect that matters extraneous to the CIS (that is, matters which do not relate directly or indirectly to the requirements for registration for gross payment and to the objective of securing compliance with those requirements) are not to be taken into account by HMRC when exercising its discretion to withdraw Gross Payment Status, the FTT did that very thing by taking into account considerations of commercial failure and administrative work. That was clearly an error of law on the FTT’s part. The FTT also erred, as we have stated in [51], in considering that an immediate application for re-registration could be made, which led it to consider wrongly that cancellation would only cause RMF administrative inconvenience and expense.

Conclusion

54. We have identified a number of fundamental errors of law in the Decision. In those circumstances, we should set aside the Decision and remake it by dismissing RMF’s appeal against HMRC’s decision under s 66(1) to cancel RMF’s Gross Payment Status for the reasons that we have given.

Disposition

55. The appeal is allowed.

Signed on Original

MR JUSTICE FANOURT

JUDGE TIMOTHY HERRINGTON

**UPPER TRIBUNAL JUDGES
RELEASE DATE: 08 March 2022**