



TC03859

Appeal number: TC/2013/09278

Penalty for late filing of CIS return – Appellant unaware of need to file return - whether reasonable excuse - no - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

EXPERT RECRUITMENT

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE MICHAEL S CONNELL

The Tribunal determined the appeal on 23 May 2014 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal received by the Tribunal Service on 3 December 2013 and HMRC's Statement of Case submitted on 7 January 2014, the Appellant submitting no response.

DECISION

The Appeal

- 5 1. Expert Recruitment appeals against a £100 penalty imposed under Paragraph 8 of Schedule 55 Finance Act (FA) 2009 for the late filing of the Contractor's Monthly return for the period ending 5 June 2013.
2. The point at issue is whether or not Expert Recruitment has a reasonable excuse for submitting a late return.

Background

- 10 3. The Construction Industry Scheme relating to the periods under appeal was introduced by Finance Act (FA) 2004 with effect from 6 April 2007. The primary legislation was supplemented by the Income Tax (Construction Industry Scheme) Regulations 2005, SI 2005 No. 2045.
- 15 4. The scheme provides for certain payments made under construction contracts by a contractor to a subcontractor to be made under deduction on account of income tax. Subcontractors who are registered for gross payment may receive payment without deduction.
- 20 5. Sections 58, 59 and 60 FA 2004 define a subcontractor, a contractor and a contract payment respectively.
6. Section 61 FA 2004 requires a contractor to make deductions at a relevant percentage from payments made to those subcontractors who are not registered to be paid gross under Section 63 FA 2004.
- 25 7. Section 70 FA 2004 permits HMRC to make regulations requiring contractors to submit periodic returns. The regulations are provided in Regulation 4 of The Income Tax (CIS) Regulations 2005.
- 30 8. Regulation 4(1) provides that a return must be made to HMRC in an approved form not later than 14 days after the end of every tax month. A tax month runs from the 6th of one month to the 5th of the next. So a return must be made by the 19th of each calendar month.
9. Regulation 4(2) and (3) specify the information which must be included on the return and Regulation 4(5) requires the return to include declarations made by the person making the return.
- 35 10. Regulation 4(10) requires a contractor to make a nil return if they have not made any payments under a construction contract during a tax month. However Regulation 4(11) provides that a nil return is not required if HMRC have been notified that the contractor will make no further payments under CIS within the following 6 months.

11. If the return is not received by the filing date a penalty of £100 is payable in accordance with Paragraph 8 Schedule 55 FA 2009.
12. If after a period of 12 months beginning with the penalty date the return remains outstanding a penalty is payable in accordance with Paragraph 11 Schedule 55 FA 2009; the penalty is the greater of 5% of any liability to make payments which would have been shown in the return or £300.
13. Both the 'filing date' and the 'penalty date' are defined at Paragraph 1(4) Schedule 55 FA 2000.
14. Expert Recruitment was required to file a Contractor Monthly return for the period ended 5 June 2013. The filing date for the return was 19 June 2013.
15. The Contractor Monthly return was filed online on 17 July 2013.
16. As the return was not received by the filing date HMRC sent Expert Recruitment a late filing penalty notice on 29 June 2013 in the amount of £100.

Appellant's contentions

17. Mr Mullan, a partner of the Appellant firm, does not dispute that his return was late but appeals the penalty on the grounds that he genuinely forgot to file the return.
18. On 26 July 2013, HMRC received an appeal against the penalty in which the following grounds for appeal were stated;
- “The last time I spoke with someone from CIS (April/May), I was informed that we were not due to make a further return until August 2013. During that time, a subcontractor commenced temporary employment and I genuinely forgot to make a CIS return. I have since made the CIS returns that were due and will now continue to do so on the 19th of every month. Apologies for this, but I can guarantee that this will not happen again and I hope that you can look upon this appeal sympathetically.”
19. HMRC sent Expert Recruitment a decision letter on 2 August 2013 rejecting the appeal and offering a review.
20. On 16 September 2013, Expert Recruitment requested a review of HMRC's decision, stating as follows;
- “I do not accept this view as this was a genuine oversight on my part. My wife always looked after all the CIS/Accounts and she remains on sick leave. I am not trying to deceive HMRC and do not see the benefit of a £100 fine. This will not happen again”.
21. HMRC carried out a review and issued their review conclusion on 25 September 2013. The outcome of the review was that HMRC's decision should be upheld.

22. Expert Recruitment submitted a further letter to HMRC on 17 October 2013 in which Mr Mullan stated:

5 “I stand by my original reasons for the appeal and still contend that the fine is totally unnecessary. I have now come to grips with managing our company dealings with CIS and I am sure you will find that all CIS returns are now made promptly and on time. I am not in a financial position to pay a £100 fine unfortunately and am willing to attend a tribunal”.

23. In response, HMRC issued a further letter to Expert Recruitment on 4 November 2013 advising that any further appeal would have to be to the Tribunal.

10 24. On 3 December 2013, Expert Recruitment submitted an appeal to the Tribunal. The grounds for appeal were cited by Mr Mullan as:

15 “I had recently taken over doing our accounts and was unaware that the CIS return had to be made. I had been told previously by HMRC that we did not have to make a further CIS return until August 2013 and hence no return was made”.

HMRC’s contentions

20 25. Expert Recruitment has traded within the new Construction Industry Scheme since 8 September 2008. Therefore HMRC consider Expert Recruitment to be well aware of the requirement to submit a return of payments made to contractors for each tax month by the 19th day of the calendar month.

26. In this instance, one CIS monthly return for the period ended 5 June 2013 has been submitted late. The CIS monthly return for the period ended 5 June 2013, due on 19 June 2013 was not filed until 17 July 2013. The return showed details of a payment made to one subcontractor and the tax deducted from the same.

25 27. Contractors who do not anticipate making any payments to subcontractors can have a phase of inactivity set on their CIS record for a period of six months at a time. A contractor should notify HMRC about a period of inactivity by ticking a box on the contractor's monthly return or by contacting HMRC in writing or by telephone. Any period of inactivity will be treated as effective from the date that the contractor notifies HMRC. Once HMRC have accepted a period of inactivity, a contractor no longer has an obligation to make a nil return for each of the income tax months the period of inactivity covers. However, if a Contractor makes payments to subcontractors at any time during this period he must notify HMRC immediately and ensure that the relevant monthly return is filed by the due date. This information is shown on the HMRC website and was therefore readily available to Expert Recruitment.

30 28. In this case, Expert Recruitment notified HMRC of a period of future inactivity on the CIS return for the month ended 5 January 2013, which was filed by internet on 16 January 2013. As a consequence, nil monthly returns were not required for the months ended 5 February, 5 March, 5 April, 5 May, 5 June and 5 July 2013. However,

Expert Recruitment subsequently paid a subcontractor in the month ended 5 June 2013 and failed to file the required CIS monthly return on or before 19 June 2013.

29. This is not the first occasion on which the issue of a late return has arisen. HMRC previously upheld appeals against penalties imposed as a result of the late receipt of CIS returns for the months ended 5 November and December 2012. In each of those appeals, Mr Mullan of Expert Recruitment stated that a paper CIS return had not been received. In addition, in his appeal against the penalty imposed as a result of the late filing of the CIS return for the month ended 5 December 2012, Mr Mullan stated that the failure occurred because the person who normally filed the returns was on sick leave. In each instance, HMRC accepted that Expert Recruitment had a reasonable excuse but issued a letter on 3 January 2013 advising that paper returns were not issued to contractors who had previously filed online. That letter further advised that all future returns should be filed on time. This is a factor that weighs against Expert Recruitment in determining whether there is a reasonable excuse for the late delivery of the return for the month ended 5 June 2013.

30. Ignorance of the law is not a reasonable excuse. It was the responsibility of Expert Recruitment to equip themselves with the relevant knowledge to enable them to comply with their tax obligations under the Construction Industry Scheme (CIS) by reading the guidance available on the HMRC website, the letter issued by HMRC on 3 January 2013 or by contacting the Construction Industry Scheme (CIS) Helpline for assistance.

31. The Construction Industry Scheme (CIS) Helpline is open 8.00am to 8.00pm Monday to Friday and 8.00am to 4.00pm on a Saturday. The CIS Helpline telephone number is shown on the HMRC website and was therefore readily available to Expert Recruitment.

32. In this instance, a penalty has been charged as a result of the late filing of the CIS return for the month ended 5 June 2013. HMRC can only act in accordance with legislation and cannot accept any inability to pay the penalty as a reasonable excuse for late filing.

33. HMRC contend that the appeal does not contain anything which demonstrates that an unexpected or unusual event, either unforeseeable or beyond the contractors control, prevented the correct operation of the CIS scheme or the submission of the CIS return by 19 June 2013. Therefore, it is the contention of HMRC that the penalty has been correctly charged in accordance with Paragraph 8 Schedule 55 Finance Act 2009.

34. Paragraph 16(1) of Schedule 55 FA 2009 allows HMRC to reduce a penalty below the statutory minimum if they think it is right because of special circumstances. While 'special circumstances' are not defined, the courts accept that for circumstances to be special they must be 'exceptional, abnormal or unusual' (*Crabtree v Hinchcliffe*) or 'something out of the ordinary run of events' (*Clarks of Hove Ltd v Bakers' Union*).

35. HMRC have considered special reduction but their view is that there are no special circumstances which would allow us to reduce the penalty.

Conclusion

5 36. The onus of proof rests with HMRC to show that the penalty was correctly imposed. If so established, the onus then rests with the Appellant to demonstrate that there was reasonable excuse for late filing of its CIS return. The standard of proof is the ordinary civil standard of the balance of probabilities.

10 37. There is no statutory definition of ‘reasonable excuse’, which is a matter to be considered in the light of all the circumstances of the particular case. A reasonable excuse is normally an unexpected or unusual event that is either unforeseeable or beyond the taxpayer's control, and which prevents them from complying with their obligation to pay on time. A combination of unexpected and foreseeable events may, when viewed together, be a reasonable excuse.

15 38. Mr Mullan says that he genuinely forgot to make a CIS return for period ending 5 June 2013 as a period of inactivity was in place. However, this is not the first occasion on which the issue of a late return has arisen. HMRC have previously accepted that Expert Recruitment had a reasonable excuse but informed the Appellant that all future returns should be filed on time.

20 39. The Appellant had previously notified HMRC of a period of future inactivity on its CIS return for the month ended 5 January 2013. As a consequence, nil monthly returns were not required for the months ended 5 February, 5 March, 5 April, 5 May, 5 June and 5 July 2013. However, as HMRC say, the Appellant subsequently paid a subcontractor in the month ended 5 June 2013 but then failed to file the required CIS
25 monthly return by the due date.

40. Mr Mullan says that his wife, who had looked after all CIS returns and accounts, was on sick leave at the time the return was due. He says that the penalty is totally unnecessary and that he has now got to grips with managing the company and the filing of necessary returns. He has learnt his lesson and all CIS returns have, since the
30 default, been filed on time.

41. There was no unexpected or unforeseeable event which caused the default. Unfortunately Mr Mullan overlooked filing his firm's CIS return. However, even a genuine oversight is not a reasonable excuse. As HMRC say it was the responsibility of the proprietors of Expert Recruitment to equip themselves with the relevant
35 knowledge to enable them to comply with their tax obligations under the CIS, whether by reading available guidance or by contacting the CIS Helpline for assistance.

42. A taxpayer acting in a reasonable manner to ensure that they adhered to their legislative obligations would acquaint themselves of any relevant and necessary information and act accordingly.

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43. The Tribunal therefore finds that the late filing penalty charged is in accordance with legislation and there is no reasonable excuse for the Appellant's failure to file its CIS return on time. There are also no special circumstances which would allow the penalty to be reduced under the Special Reduction provisions. The appeal is accordingly dismissed and the £100 late filing penalty confirmed.

44. 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.

**MICHAEL S CONNELL
TRIBUNAL JUDGE**

RELEASE DATE: 31 July 2014