



TC03903

Appeal number: TC/2012/06754

Penalty for late filing of CIS return - nil return one day late - whether reasonable excuse - no - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBERS**

ELSWOOD MECHANICAL SERVICES

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE MICHAEL S CONNELL

The Tribunal determined the appeal on 26 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 dated 27 June 2012, and HMRC's Statement of Case, received on 31 March 2014, the Appellant submitting no response.

DECISION

The Appeal

- 5 1. Elswood Electrical Services ('the Appellant'), 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 March 2012.
2. The point at issue is whether or not the Appellant 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 sub-contractor, 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 sub-contractors 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. The Appellant was required to file a Contractor Monthly return for the period ended 5 March 2012. The filing date for the return was 19 March 2012.
15. The Contractor Monthly return was filed on 20 March 2012.
16. As the return was not received by the filing date, HMRC sent the Appellant a late filing penalty notice on 3 April 2012 in the amount of £100.
17. On 19 April 2012 Butterworth Jones, as agent of the Appellant appealed against the penalty, saying:
- “We hereby wish to appeal against this penalty notice as it was a NIL Return and filed online on the 20th March 2012. Please find enclosed a copy of the Online Return.”
18. HMRC sent the Appellant a decision letter on 1 May 2012, rejecting its appeal and offering a review.
19. On 8 May 2012 the Appellant requested a review of HMRC's decision saying :
- “Enclosed copy of confirmation of successful "Nil Return" filed on 16 February 2012 for 06.02.12 to 05.03.12.”
20. HMRC carried out a review and issued their review conclusion on 31 May 2012. The outcome of the review was that HMRC's decision should be upheld.
21. On 27 June 2012, the Appellant's agent notified its appeal to the Tribunal reiterating the earlier grounds of appeal, and saying:
- “A Nil return submission was made on the 15th March for Accounts Reference 794PK00009481 as per your statement below:
- "If you have no PAYE/NICs/CIS payment due**
If you have a PAYE (Pay As You Earn)/National Insurance Contributions (NICs)/CIS scheme and will not be making any PAYE/NICs/CIS payment for any tax month or quarter, you must let HMRC know that the month or quarter will be a nil payment declaration by using the link below. You will need to do this before the payment due date to avoid being issued with a payment reminder.”

A CIS NIL Return was also filed online but on the 20th March 2012.
...Therefore the Nil return sent on 15th March should suffice and taken as nil return sent in on time...”

5 22. On 18 July 2012 the Tribunal directed that the case be stood over.

Appellant’s contentions

23. The grounds of appeal are as stated in the Notice of Appeal.

HMRC’s contentions

10 24. This appeal is not concerned with specialist or obscure areas of tax law. It is concerned with the ordinary every day responsibilities of the Appellant to ensure their Contractor Monthly return was filed by the legislative due date.

25. The Appellant has traded within the new Construction Industry Scheme since it began on 6 April 2007; HMRC would consider them to be an experienced contractor and fully aware of their tax obligations.

15 26. It is incumbent on contractors to make sure that they have adequate procedures in place to meet their tax obligations; these obligations would include the making of payments (or nil payment declarations) as well as the filing of their Contractor Monthly returns on time.

20 27. A return needs to be correctly submitted and received by HMRC before it is deemed to have been validly delivered and the contractor's filing obligation met.

28. There is no record of a Contractor Monthly return being received for the period ending 5 March 2012 from the Appellant or their agent prior to 20 March 2012.

29. HMRC have no records to indicate that there were any problems with the CIS online filing system, which is active 24 hours a day seven days a week.

25 30. It is the responsibility of the contractor, to ensure that the regulations are followed and their return is delivered to HMRC by the legislative deadline. This responsibility cannot be transferred or removed by engaging an agent or any other person to act on their behalf; successful submission of the return remains the responsibility of the contractor at all times.

30 31. Where a person has asked another person to do something on their behalf, that person is responsible for ensuring that the other person carries out the task. They cannot claim they had a reasonable excuse merely because they delegated the task to a third party and that third party failed to complete it.

35 32. Failure due to the mistake of an agent cannot be deemed a reasonable excuse for the Appellant not having met their tax obligations.

33. If the Appellant feels their agent has failed in their professional capacity or not followed specific instructions then they should seek redress directly from that agent.

34. In the case of *Stewarton Polo Club Ltd v HMRC*; Judge Dr C. Staker stated in paragraphs 14 and 17:

5 “14. The Tribunal accepts that in cases where highly specialised advice is
required, a taxpayer may have no choice but to rely on the advice of a
specialist. However, in cases where no specialist advice is required, the
Tribunal does not consider that a taxpayer can be absolved of personal
responsibility to file returns and pay taxes on time through reliance on a
10 specialist.
17. The Tribunal considers that the obligation to ensure that the return is filed
on time is on the Appellant. If the Appellant uses an agent such as an
accountant, the Appellant is in general under an obligation to ensure that the
agent files the return on time. Failure of the agent to meet his or her
15 obligations to the Appellant might entitle the Appellant to some recourse
against the agent, but in the Tribunal's view reliance on a third party such as
an accountant cannot relieve the Appellant of its own obligation to file the
P35 on time. The Tribunal does not accept that the bare fact that
responsibility had been entrusted by the Appellant to a third party of itself
20 amounts to a reasonable excuse.”

35. The statement in relation to PAYE/NICs/CIS quoted by the agent within the Notice of Appeal clearly refers to payments and the requirement to make a nil payment declaration if appropriate.

25 36. Although the agent states that a nil submission was made on 15 March 2012 as evidenced by a successful submission receipt, HMRC would submit that this submission was in respect of a nil payment declaration, which HMRC's records for the Appellant confirm was posted to their PAYE account for month 11 on 16 March 2012.

30 37. In line with Regulation 4 of Statutory Instrument 2005 No. 2045 the Income Tax (CIS) Regulations 2005 the contractor is legally bound to ensure that HMRC has received their return by the 19th of the month; the making of a nil payment declaration on 15 March 2012 can have no bearing on this appeal or be deemed a reasonable excuse for the Appellant's failure to file their Contractor Monthly return on
35 time.

38. Information about contractor tax responsibilities, including the requirement to file a Contractor's Monthly return (including a nil return), return filing dates, penalties etc. as well as information in relation to making payments, payment deadlines and nil
40 payment declarations is well within the public domain and widely available via the internet including HMRC's website.

39. A contractor/agent acting in a reasonable manner to ensure that they adhered to their legislative obligations would make themselves aware of such information and

act accordingly. The penalty was imposed in accordance with legislation as the return was filed late and not to compensate HMRC for lost or late paid tax.

5 40. HMRC have no discretion in the calculation of the penalty amount as it is set in statute and all contractors, no matter the size, who fail to submit their return on time will be subject to penalty under the legislation.

41. The penalty has been imposed to promote the efficient operation of the taxation system and member states are allowed a wide margin of appreciation in framing and implementing taxation policies; furthermore HMRC submit that the penalty has been correctly charged in accordance with the legislation

10 42. In the case of *HM Revenue & Customs v Facilities and Maintenance Engineering Ltd* (2006) 77 TC 575 it was stated in paragraph 33 that:

15 '...whether the rules are reasonable or unreasonable, they are undoubtedly the rules which Parliament has laid down, and neither the Commissioners nor the courts on appeal have any power to dispense a company, with whose case they sympathise, from the consequence of them.'

43. HMRC acknowledge that First-tier Tribunal decisions do not set precedents and as such each case must be considered on its own merits; however Upper Tribunal decisions do set precedent.

20 44. In the case of *Hok Ltd v Revenue & Customs*, the Upper Tribunal found that HMRC's decision to charge Hok Ltd penalties for late filing of their Employer's Annual Return was correct and that the First-tier Tribunal acted beyond its jurisdiction in discharging the penalties. The First-tier Tribunal does not have the power to discharge or adjust a fixed penalty which is properly due because it thinks it is unfair. The decision of the Upper Tribunal creates a precedent and is binding on all cases where similar issues are raised.

45. Although the Upper Tribunal decision in relation to Hok Ltd related to penalties for the late filing of an Employer's Annual return; the penalty charged in this case for late filing of the Contractor Monthly return is also a fixed penalty.

30 46. Furthermore, in the case of *Anthony Boshier v HMRC* the Upper Tribunal decided that the penalty regime, which includes a right of appeal and provides HMRC with the power to mitigate a penalty, does not infringe a person's human rights and does not impose disproportionate penalties. Further, the Tribunal does not have jurisdiction to discharge or adjust fixed penalties which have been correctly imposed for the correct amount.

35 47. The legislation has been designed to treat all taxpayers fairly and equally placing responsibility for delivery of the Contractor Monthly return squarely on the shoulders of the contractor. As such it was the Appellant's responsibility to ensure that the legislation was correctly followed and the return delivered on time; their failure to do
40 so resulted in the imposition of the penalty.

48. HMRC can only act within legislation; as such a penalty may only be set aside if it has been imposed incorrectly or the Appellant has a reasonable excuse for the failure.

5 49. As the Appellant has not provided a reasonable excuse for failing to file their return on time, the penalty for late filing of the return has been correctly charged.

10 50. 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*).

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

Conclusion

15 52. 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.

20 53. 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 unforeseeable events may, when viewed together, be a reasonable excuse.

25 54. HMRC charge late filing penalties to encourage prompt filing and to provide a measure of fairness between contractors who file on time and those who do not. Penalties are imposed to promote the efficient operation of the taxation system. The Appellant has failed to operate the Construction Industry Scheme correctly and in these circumstances HMRC have to be seen to be consistent in their approach to all
30 their customers, particularly to those who comply with the regulations. It was the Appellant's responsibility to ensure that the CIS monthly return was filed on time and to ensure that all obligations under the Construction Industry Scheme are met.

35 55. A taxpayer acting in a reasonable manner would ensure that they adhered to their legislative obligations. The actions of the contractor must be considered from the perspective of a prudent person, exercising reasonable foresight and due diligence, having proper regard for their responsibilities under the Tax Acts. If the contractor could reasonably have foreseen the event which caused the default, whether or not it is within their control, the contractor should take steps to meet its obligations.
40 Furthermore if there is in fact a reasonable excuse it must exist throughout the failure period.

56. The Appellants say that a Nil submission was made on the 15 March 2012 and that a CIS Nil Return was filed online on 20 March 2012. The Appellant is saying that the submission sent on 15 March should suffice and be taken as a Nil return submitted on time. However a return must be correctly submitted and received by HMRC before it is deemed to have been validly delivered and the contractor's filing obligation met. As HMRC say, the statement in relation to PAYE/NICs quoted by the agent within the Notice of Appeal clearly refers to payments and the requirement to make a nil payment declaration if appropriate. The making of a nil payment declaration on 15 March 2012 had no bearing on the Appellant's failure to file their Contractor Monthly return on time.

57. Having considered the Appellant's grounds of appeal there appears to have been no unexpected or unusual event that was either unforeseeable or beyond its control which caused the return to be filed late. In the absence of any explanation the appeal does not contain anything which shows that there was a reasonable excuse that prevented the Appellant from operating the Scheme correctly and submitting the monthly return on time.

58. The Tribunal therefore concludes 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.

59. 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: 11 August 2014