



TC03907

Appeal number: TC/2013/04555

Penalty for late filing of CIS return - nil return one day late - Appellant filed late because of internet connection problems - whether reasonable excuse - no - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

A G D JOINERS LTD

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE MICHAEL S CONNELL

The Tribunal determined the appeal on 28 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 dated 05 July 2013 and HMRC's Statement of Case, received on 28 March 2014, the Appellant submitting no response.

DECISION

The Appeal

1. A G D Joiners Ltd ('the Appellant'), appeals against a £100 penalty imposed
5 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 February 2013.

2. The point at issue is whether the Appellant has a reasonable excuse for submitting a late return and whether a penalty of £100 should be discharged given that the Appellant's return was a nil return and only one day late

10 Background

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
15 legislation was supplemented by the Income Tax (Construction Industry Scheme) Regulations 2005, SI 2005 No. 2045.

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.
- 5 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.
- 10 14. The Appellant was required to file a contractor monthly return for the period ended 5 February 2013. The filing date for the return was 19 February 2013.
15. The contractor monthly return was filed on 20 February 2013.
16. As the return was not received by the filing date, HMRC sent the Appellant a late filing penalty notice on 2 March 2013 in the amount of £100.
- 15 17. On 16 March 2013 the Appellant appealed against the penalty, saying:
- 20 “Unfortunately our internet would not connect and has become a problem. I was unable to send [the return] until 20 February even though I tried numerous times on 18 and 19 February. We have contacted our supplier and are awaiting a new router which hopefully will resolve the problem. Pleas also consider that it was a nil return for that month”.
18. HMRC sent the Appellant a decision letter on 10 April 2013, rejecting its appeal and offering a review.
- 25 19. On 25 April 2013 the Appellant requested a review of HMRC's decision saying that the internet problems were an unusual and unforeseeable event outside their control and that therefore the appeal should be allowed.
20. HMRC carried out a review and issued their review conclusion on 10 June 2013. The outcome of the review was that HMRC's decision should be upheld.

Appellant’s contentions

- 30 21. On 5 July 2013, the Appellant’s agent notified its appeal to the Tribunal reiterating the earlier grounds of appeal, and saying...
- “AGD Joiners Ltd encountered problems with their internet connection and are now waiting for a new router that will hopefully solve the problem
- 35 AGD Joiners Ltd did not know they could file a nil return over the telephone.

AGD Joiners Ltd feels that the £100 penalty is excessive and extreme as the return was only one day late and there was no tax due to HMRC.”

HMRC’s contentions

- 5 22. The Appellant has been registered within the Construction Industry Scheme (CIS) since the scheme began in April 2007 and has been filing monthly returns during this period. HMRC would expect this contractor to be familiar with the filing process and to be aware of their obligations as a contractor operating within CIS.
- 10 23. This is not the first occasion on which the issue of a late filing penalty arose and appeals submitted. Late filing penalties were previously imposed in respect of late returns for May 2008, June 2008, November 2009, October 2010, November 2011 and October 2012. Previous appeals were upheld in the Appellant’s favour and when settling the November 2009 and October 2012 appeals on 22 January 2010 and 28 November 2012 respectively HMRC issued education letters reminding the contractor
- 15 of their CIS obligations and responsibilities.
24. The October 2012 appeal cited broadband/internet connection problems as the reason for the filing failure and in this appeal the Appellant cites similar grounds. HMRC contend that it would be reasonable to expect the Appellant to have put adequate measures in place to ensure they can file on time. The letters issued on 22
- 20 January 2010 and 28 November 2012 state that Appellants should provide a copy of the Gateway receipt with any future appeals citing online filing problems. It was also pointed out that the Appellant should contact the technical helpline for advice in relation to online filing problems. The Appellant has not provided any evidence or a Gateway receipt in respect of his filing problems and there is nothing on HMRC’s
- 25 records to indicate that the Appellant made contact with the CIS helpline to flag up problems that would prevent them filing on time.
25. 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. A ‘nil’ return can be registered over the telephone by contacting the CIS helpline. The Appellant states that
- 30 they were unaware of this facility to file a nil return by phone. HMRC’s website clearly states that contractors can file a nil return by phone. Furthermore, the educational letters issued on 22 January 2010 and 28 November 2012 stated –
- 35 “If you have made no payments to subcontractors during a return period, you can contact the CIS Helpline on 0845 366 7899 and register a “nil” return over the telephone. This must be done by the 19th of the month otherwise a penalty will be charged.”
26. 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
- 40 will be subject to penalty under the legislation.

27. 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.

28. 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.

29. HMRC contend that the proprietors of the Appellant were aware of their obligations as a contractor and were adequately advised on their CIS responsibilities and obligations and that the penalty was correctly charged in accordance with the legislation.

30. 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. 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 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.

31. 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.

32. 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*).

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

Conclusion

34. 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.

35. 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.

- 5 36. 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, efforts should be made to avoid the default in order that the contractor meets its obligations.
- 10 37. 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.
- 15 38. As HMRC say, this is not the first occasion on which the issue of a late filing penalty has arisen. Late filing penalties were previously imposed in respect of previous late returns. Appeals were upheld but HMRC issued education letters reminding the contractor of their CIS obligations and responsibilities.
- 20 39. An October 2012 appeal cited broadband/internet connection problems as the reason for the filing failure and in this appeal the Appellant refers to similar grounds. It would therefore be reasonable to expect the Appellant to have put adequate measures in place to ensure they could file on time should similar problems be encountered in the future. Letters issued by HMRC advised the Appellant to provide a copy of the Gateway Receipt with any future appeals citing online filing problems. The Appellant was also notified that they could contact the technical helpline for advice in relation to online filing problems. There is nothing on HMRC's records to indicate that the Appellant made contact with the CIS helpline to flag up problems that would prevent them filing on time.
- 25 40. If a contractor has made no payments to subcontractors during a return period, he can contact HMRC's CIS Helpline and register a "nil" return over the telephone. The Appellant would or should have been aware of this from previous advice given by HMRC.
- 30 41. 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. 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.
- 35 42. The Tribunal therefore concludes that the late filing penalty has been charged 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.
- 40 43. 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

5 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.

10 **MICHAEL S CONNELL**
TRIBUNAL JUDGE

RELEASE DATE: 11 August 2014

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