



TC06134

Appeal number: TC/2017/02511

CONSTRUCTION INDUSTRY SCHEME – penalty for the late delivery of the first CIS return – whether delay in the registration process for CIS reasonable – whether reasonable excuse for the late filing of return – appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

BIRLEY ESTATE LIMITED

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE HEIDI POON

The Tribunal determined the appeal on 2 August 2017 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 22 March 2017 (with enclosures), and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 8 June 2017.

DECISION

Introduction

1. This appeal is against a late filing penalty of £100 for the tax month ended 5 August 2016, and is lodged by Mr William Linnell, of the appellant company, Birley Estate Limited.
2. The appellant company is a contractor operating within the Construction Industry Scheme ('CIS'). As a contractor, the appellant was required to file the CIS return by 19 August 2016. The return was filed on 19 September 2016, and triggered the late filing penalty.

Application for making a late appeal

3. The penalty notice was issued on 31 August 2016, and the time limit for making an appeal was 30 September 2016, being 30 days after the date of issue.
4. On 6 February 2017, the appellant appealed to HMRC against the penalty, which was rejected for it being significantly out of time.
5. On 22 March 2017, Mr Linnell notified the appeal to the Tribunal, and the notice included an application to make a late appeal.
6. Mr Linnell explained in the application that he telephoned HMRC on receipt of the penalty notice, and thought the phone call meant that the matter was dealt with. There was clearly a misunderstanding on the part of the appellant, which was only clarified in stages by the subsequent phone calls to HMRC on 7 February and 21 March 2017. I consider the appellant had a reasonable excuse for making the appeal late, and in accordance with the overriding objective under Rule 2 of the Tribunal Rules 2009, which is 'to deal with cases fairly and justly', I admit the late appeal.

The applicable legislation

7. The scheme was introduced in 1975 to legislate on the deduction of tax at source for self-employed workers in the building industry. The current rules are set out at ss 58-63 of FA 2004, and Schedule 11 of that Act, together with the Income Tax (Construction Industry Scheme) Regulations 2005 ('the Regulations').
8. Regulation 4 deals with the submission of monthly returns. The paragraphs relevant to this appeal are as follows:
- (1) A return must be made to the Commissioners for Her Majesty's Revenue and Customs in a document or format provided or approved by the Commissioners—
- (a) not later than 14 days after the end of every tax month, by a contractor making contract payments or payments which would be contract payments....

(13) A penalty under section 98A of TMA in relation to a failure to make a return in accordance with paragraphs (1) or (10) arises for each month (or part of a month) during which the failure continues after the 19th day of the sixth month following the appointed day.’

5 9. Section 98A of the Taxes Management Act 1979, under the heading ‘Special penalties in the case of certain returns’ so far as is relevant in this case, reads:

‘(1) ...regulations under section 70(1)(a) or 71 of the Finance Act 2004 (sub-contractors) may provide that this section shall apply in relation to any specified provision of the regulations.

10 (2) Where this section applies in relation to a provision of regulations, any person who fails to make a return in accordance with the provision shall be liable—

(a) to a penalty or penalties of the relevant monthly amount for each month (or part of a month) during which the failure continues...

15 (b) ...

(3) For the purposes of subsection (2)(a) above, the relevant monthly amount in the case of a failure to make a return—

(a) where the number of persons in respect of whom particulars should be included in the return is fifty or less, is £100....’

20 10. The penalty regime governing the late filing of a return is under Sch 55 to the Finance Act 2009 (‘FA 2009’). Paragraph 8 of Sch 55 provides for a fixed penalty of £100 for the late filing of a CIS return.

25 11. Paragraph 23(1) of Sch 55 provides that liability to a penalty under any paragraph of the Schedule does not arise in relation to a failure to make a return if the taxpayer satisfies HMRC or (on appeal) the Tribunal that there is a reasonable excuse for the failure.

The Facts

12. The appellant registered for CIS on 6 August 2016, stating 6 April 2016 as the effective start date of the registration.

30 13. HMRC issued penalties for the months from May 2016 but these were cancelled when Mr Linnell contacted HMRC and confirmed that the subcontractor did not start until 5 August 2016. The return periods for May, June and July 2016 were marked as ‘exempt’ and further penalties for the said periods were inhibited.

35 14. In relation to the registration, the PAYE activation code from Government Gateway was dated 9 August 2016, and was activated on 18 August 2016.

15. The activation of PAYE registration was followed by the issue of the CIS activation code dated 19 August 2016, and the CIS registration was effected on 31 August 2016 by using the activation code.

16. The month of 5 August 2016 was the first return to be filed by the appellant after its registration as an employer and a contractor.

17. The CIS return for 5 August 2016 was filed online on 19 September 2016, and the £100 penalty was imposed.

5 18. There is no dispute that the monthly return was required, or that the filing of the return was late by a month.

The Appellant's Grounds of Appeal

19. The grounds of appeal are summarised as follows:

10 (1) The appellant engaged one labour-only subcontractor and recognise the need to register for CIS. However it did not realise that it also had to become registered for PAYE at the same time.

(2) The appellant was registered for PAYE on 18 August 2016 after receiving the activation letter.

15 (3) The appellant had to wait to become registered for CIS, and this was done on 31 August 2016.

(4) By the time the appellant could register for CIS, it was already too late to submit the return for the month of 5 August 2016.

(5) The appellant then verified the subcontractor, made a monthly return and paid the due tax.

20 (6) The appeal is based on the fact that it took weeks to set up an online scheme and the appellant had no means of being able to make a return for that month on time.

20. In the appeal form submitted to HMRC on 6 February 2017, Mr Linnell stated 'ill health' as the reasonable excuse. Further information was given on the form
25 stating: 'I have had a pinched nerve in my neck and I have been unable to sit at a computer without an unbearable stepping pain in my shoulder.' The reasonable excuse was stated to have ended on 12 December 2016.

HMRC's Statement of Case

30 21. HMRC contend that the appellant should have registered for CIS before the date the subcontractor started on 5 August 2016.

22. As a contractor trading within the CIS, the appellant has the responsibility to ensure that the regulations are followed. In this case, the penalty has been charged under s 98A(2) of TMA. The grounds of appeal do not indicate any exceptional circumstances preventing the appellants from operating the scheme correctly and
35 submitting the appropriate return.

23. A contractor is legally obliged to ensure that HMRC receive their returns by the 19th of the month.

24. Although HMRC sympathise with Mr Linnell for his illness, it did not amount to a reasonable excuse as the illness was an ongoing condition. He would be expected to make arrangements for completing and sending in the return on time.

5 25. Paragraph 16(1) allows HMRC to reduce the penalty below the statutory minimum if they think it is right because of special circumstances. While ‘special circumstances’ are not defined in the legislation, the courts accept that for circumstances to be special, they must be ‘exceptional, abnormal or unusual’, or ‘something out of the ordinary run of events’.

10 26. HMRC have considered special reduction and their view is that there are no special circumstances which would allow them to reduce the penalty.

Discussion

27. In determining this appeal, I first consider whether the appellant had a reasonable excuse for the late filing of the CIS return for 5 August 2016. In the absence of reasonable excuse, it will then be necessary to consider special reduction.

15 28. HMRC’s case is based on the prima facie fact that the CIS return was filed late. The appellant, however, contends that the return simply could not be filed by the due date because the CIS registration had taken weeks. In other words, the return could not have been filed since the appellant was not yet registered for CIS at the time the return was due.

20 29. It appears to me that the relevant issue to address in this appeal is whether the appellant had a reasonable excuse for failing to register for CIS earlier. In this respect, I draw a distinction between a recurrent, routine task such as the filing of a return, and a one-off procedure such as the registration with a scheme.

25 30. There is no statutory definition for “reasonable excuse”. In *Rowland v HMRC* [2006] STC (SCD) 536 at [18], it is made clear that whether there was any reasonable excuse “is a matter to be considered in the light of all the circumstances of the particular case.” The test articulated in *The Clean Car Company Ltd v The Commissioners of Customs & Excise* [1991] VATTR 234 by Judge Medd QC is the relevant test to apply in this case:

30 ‘One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?’

35 31. In deciding whether the reasons given by Mr Linnell amount to a reasonable excuse for the delay in being registered for CIS, I have regard to the following facts:

(1) The subcontractor started on 5 August 2016, and the appellant started the registration process on 6 August 2016.

(2) The PAYE activation code was generated on 9 August 2016, and was used to register the appellant for PAYE on 18 August 2016. There was a gap of 9 days.

5 (3) The CIS activation code was generated on 19 August 2016, and was used to register the appellant for CIS on 31 August 2016. There was a gap of 12 days.

32. I infer from these primary facts that the appellant was not already registered as an ‘employer’ for PAYE purposes, which meant that the appellant had to become registered for PAYE first, before it could register as a contractor for CIS purposes.

10 33. So far as the generation of activation codes was concerned, there was no delay in HMRC’s response to Mr Linnell’s requests. The activation codes were generated within 2 working days of the applications: (a) PAYE registration was applied for on 6 August (a Saturday,) and the code was generated on 9 August; (b) CIS registration was applied for on 18 August (a Thursday), and the code was generated on Friday 19
15 August.

34. The dates on the Government Gateway letters can be taken as the dates the activation codes were generated. However, the dates of issue of the codes do not equate to the dates of delivery by post of these codes. It is not open to me to find the actual dates of receipt of these codes by Mr Linnell based on the facts in front of me.

20 35. Taking judicial notice, it is not uncommon for a day or two to elapse before a notice so generated (ie automatically by a computerised process) enters HMRC’s post-room, and that the delivery of this kind of communication by HMRC is most likely to be by second-class post.

25 36. I find therefore that Mr Linnell acted reasonably promptly to register the appellant for PAYE on 18 August 2016, in view of the fact that the receipt of the code could have been as late as 15 August 2016.

37. For the same reasons, I find the passage of 12 days from the date the CIS activation code was generated to the registration for CIS was not unreasonable, especially in view of the neck pain Mr Linnell was suffering at the time.

30 38. While I agree with HMRC that the neck pain, of itself, did not amount to a reasonable excuse for the late filing of a return, it does not follow that it was unreasonable for the neck pain to contribute to some short-term delay in a one-off procedure. With a routine compliance task, a prudent taxpayer exercising foresight would make arrangements to ensure that the return is filed on time if he has been
35 suffering from an ongoing condition. However, registration is a procedure that needs only to happen once. In the circumstances Mr Linnell found himself, to have acted on the activation code for CIS on 31 August 2016 was entirely reasonable.

39. Since the appellant was not already registered for PAYE, its CIS registration had involved two stages. That the two-stage process had taken 25 days to effect the

CIS registration from start to finish does not point to the cause of the delay as lying either with HMRC or with Mr Linnell.

40. In any event, the PAYE activation code could have arrived some four working days after 9 August 2016. Even if Mr Linnell had acted immediately to register the appellant for PAYE, it was unlikely that it would have made any difference to the fact that the appellant would still not have been registered for CIS by 19 August 2016 for the first CIS return to be filed on time.

41. The material question therefore is whether Mr Linnell could have started the registration process a whole month earlier. Had he acted reasonably by starting the registration process on 6 August 2016, the day after the subcontractor started working for the appellant company?

42. If the appellant was taking on an employee, it would be reasonable to expect that Mr Linnell would have known a month in advance that the employee would be starting on 5 August 2016, and started the registration for PAYE a month before the start date of the employee.

43. The engagement of a subcontractor does not require the same kind of lead-in time as the engagement of an employee, and it is not improbable for a decision to contract with a subcontractor to be taken only shortly before the actual start date.

44. Furthermore, I have particular regard to the following two facts:

(1) that the start date of the subcontractor in this case was on the *last* date of the return period for 5 August 2016, and

(2) that the return period was the *first* return for the appellant.

45. I conclude therefore that it is not unreasonable for Mr Linnell to start the registration process the date after the subcontractor had actually started, since the subcontractor could have postponed the start date, or turned down the offer to be contracted. Unlike an employee, a subcontractor is, after all, 'his own boss' and has the liberty to choose when to carry out the contracted work.

46. Had the subcontractor started one day later, on 6 August 2016, the first return would not have been due until 19 September 2016. If Mr Linnell had taken the same course of action, he would have filed the first return for the appellant on time.

47. The fact that Mr Linnell put 6 April 2016 as the 'effective date' of the appellant's CIS registration does not change my conclusion. I take that Mr Linnell had simply put the start of the tax year 2016-17 as the 'effective date'.

48. For all these reasons, I find what Mr Linnell did was a reasonable thing for a responsible taxpayer, conscious of and intending to comply with his obligations regarding tax, but placed in the situation that the appellant found itself at the relevant time, a reasonable thing to do. I allow the appeal.

Decision

49. The penalty of £100 for the CIS return period ended 5 August 2016 is cancelled.

50. 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.

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**DR HEIDI POON
TRIBUNAL JUDGE**

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RELEASE DATE: 27 SEPTEMBER 2017