TC06409

Appeal number: TC/2017/04656

CONSTRUCTION INDUSTRY SCHEME – penalty for the late delivery of CIS returns – late notification and registration – continuous late filing of returns – whether manual forms allegedly sent credible – whether precedent set by HMRC erroneously cancelling penalties for its associated company — whether reasonable excuse – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MARKEY CIVILS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE HEIDI POON
MRS SONIA GABLE

Sitting in public at the Royal Courts of Justice, Belfast on 29 September 2017

Mr Gerry Boyle, accountant, for the Appellant

Mrs Mary Donnelly, HMRC officer, for the Respondents

DECISION

Introduction

1. The appellant, Markey Civils Ltd, is a contractor within the Construction Industry Scheme ("CIS") and is required to file monthly returns to account for any payments made to subcontractors in each return period.

2. This appeal is against the late filing penalties for nine CIS returns for the periods 07/15 to 03/16. (The period 07/15 refers to the month from 6 June 2015 to 5 July 2015, and so on.) The total amount of penalties as stated on the Notice of Appeal was £2,100; HMRC cancelled (in error) the penalties of £300 in relation to 12/15, leaving the balance of £1,800 as the quantum under appeal.

3. The principal issue for the Tribunal in this appeal is to determine whether the appellant had a reasonable excuse for the late filing of the CIS returns for any of the periods.

4. The appellant was represented by Mr Gerry Boyle, who is an accountant of the firm which acts for the appellant.

Application to appeal out of time

5. The appellant submitted an online appeal to HMRC against the penalties on 3 February 2017. HMRC rejected the late appeal by letter dated 22 February 2017.

6. On 5 June 2017, the appellant notified its appeal to the Tribunal and made an application to appeal out of time. It gave as a reason for the late appeal that HMRC's letter of 22 February 2017 was only received on 2 May 2017.

7. At the start of the hearing, Mrs Donnelly, representing the respondents, informed the Tribunal that HMRC have accepted the late appeal. The proceedings therefore dealt with the substantive matter as respects the penalty appeal.

Evidence

8. No evidence was led by either party. The appellant company was represented by Mr Boyle as its accountant, and no director of the appellant was present at the hearing. The only documentary evidence from the appellant was its correspondence in relation to the lodging of the appeal, but none in relation to the substantive matter which forms the subject of the appeal.

The applicable legislation

9. 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").

10. 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.

11. 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.
>
> (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…
>
> (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….

12. The details of the penalty regime in relation to CIS late filing are provided under paragraphs 7 to 13 of Schedule 55 to the Finance Act 2009 ("Sch 55"). Paragraph 8 of Sch 55 provides for a fixed penalty of £100 for failure to file a CIS return by its due date (that is, for each batch of 50 contractors). Paragraph 9 of Sch 55 provides for a fixed penalty of £200 if the failure continues after 2 months of the penalty date. For the present appeal, only para 8 and 9 penalties are imposed.

13. 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 statute specifically excludes "an insufficiency of funds" as a reasonable excuse, and in respect of reliance of a third party, the provision under sub-para 23(2)(b) should be applied in conjunction with sub-para 23(2)(c):

> "23(2)(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and
>
> (2)(c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased."

14. The right of appeal against a penalty is provided by s 100B of the Taxes Management Act 1970 ("TMA") and the relevant provisions are:

> "(1) An appeal may be brought against the determination of a penalty under section 100 above and, subject to the following provisions of this section, the provisions of this Act relating to appeals shall have effect in relation to an appeal against such a determination as they have effect in relation to an appeal against an assessment to tax except that references to the tribunal shall be taken to be references to the First-tier Tribunal.
>
> (2) On an appeal against the determination of a penalty under section 100 above section 50(6) to (8) of this Act shall not apply but--
>
> (*a*) in the case of a penalty which is required to be of a particular amount, the First-tier Tribunal may--
>
> (i) if it appears that no penalty has been incurred, set the determination aside,
>
> (ii) if the amount determined appears to be correct, confirm the determination, or
>
> (iii) if the amount determined appears to be incorrect, increase or reduce it to the correct amount ..."

15. Section 118(2) TMA can deem a default not to have taken place if the taxpayer has a reasonable excuse. The section relevantly provides:

> "... where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased."

16. Under s 102 TMA, HMRC has a specific power to mitigate penalties:

> "The Board may in their discretion mitigate any penalty, or stay or compound any proceedings for a penalty, and may also, after judgment, further mitigate or entirely remit the penalty."

Factual background

17. The appellant, Markey Civils Ltd, is an associated company of Markey Drilling Ltd. The two companies are in the common ownership of their shareholder directors, Ciaran Markey and his brother.

18. Formerly, the business carried on by the Markey brothers was trading as a partnership for three to four years. In November 2014, Markey Civils and Markey Drilling were formed to become the trading medium for the business.

19. The partnership business was CIS registered and filed paper CIS returns, which were provided by HMRC. Each monthly return was delivered by post around the fifth of the month, and the return so supplied by HMRC was printed with the details of the business: name, address, and CIS reference. The paper CIS return was also accompanied by a pre-addressed envelope for the completed returns to be delivered to the relevant HMRC office.

20. The partnership was both a contractor and a subcontractor in the CIS scheme, and for each return period, the partnership would offset the tax that it had borne at 20% of the gross payments receivable as a subcontractor, against the tax it had deducted in its capacity as a contractor, and made payment on the net liability.

21. There was a period of overlap when both the partnership and the new companies were simultaneously trading for a few months after November 2014, according to Mr Boyle. However, he was unable to be specific about the exact time when the partnership ceased, but said that "the partnership traded for a short time with overlap with the companies".

22. On 27 October 2015, the two companies were registered online for CIS.

23. From April 2016, the paper return filing option was completely phased out, and CIS returns can only be filed online. From the online system, the appellant became aware of the fact that the returns from 06/15 to 03/16 were outstanding; these were then filed online in two batches:

(1) On 29 June 2016, the returns for periods 07/15, 08/15, 09/15, 12/15, 01/16, 02/16 and 03/16 were filed.

(2) On 28 July 2016, the returns for periods 10/15 and 11/15 were filed.

The appellant's case

24. On the appeal form to HMRC submitted on 3 February 2017, the reasons given for the appeal are:

(1) The company did not receive a paper return to complete but instead completed a manual CIS 300 return.

(2) No correspondence from HMRC to suggest that the return had not been received or processed.

(3) The company filed the returns as soon as it became aware of them being outstanding.

25. The Notice of Appeal states the grounds of appeal as follows:

(1) The company were not aware of the CIS returns being overdue as they were posted to HMRC Newry office; no correspondence was received from HMRC to indicate that they were not received.

(2) This was accepted as reasonable excuse by HMRC for one month (12/15) and therefore should have been acceptable for all other months.

(3) The reasonable excuse was accepted by HMRC in relation to Markey Drilling Ltd for the same monthly periods, amounts. A precedent has been set for the appeal by Markey Civils to be treated in the same way as Markey Drilling.

Representations at the hearing

26. Mr Boyle informed the Tribunal that the partnership was having "various problems with the paper system at this stage" in obtaining CIS vouchers from its "customers" (ie the contractors of the partnership) for the purposes of the offset in each CIS return period. We understand what Mr Boyle meant by "at this stage" to be the period of overlap when the partnership co-existed with the two companies.

27. According to Mr Boyle, his office filed "manual forms" for the appellant for these periods. By "manual forms", he meant blank CIS paper returns that his office had used for other clients, and the blank forms were filled in with the appellant's details that would have been pre-populated. The manual forms were completed with figures provided by the appellant, and posted to HMRC's regional office in Newry.

28. Mr Boyle informed the Tribunal that "up until March 2016", the manual forms were used, for both Markey Civils and Markey Drilling.

29. Furthermore, it was only in April 2016 when the online filing of CIS became mandatory that it came to his attention that HMRC's records showed that the CIS returns for the periods from 6/15 to 3/16 remained outstanding.

HMRC's case

30. For the respondents, Mrs Donnelly stated that the two companies Markey Drillings and Markey Civils were due returns for the same periods. The returns were filed late by Markey Drilling and CIS penalties were equally imposed. The decision to cancel the penalties for Markey Drilling was wrongly made, because the review officer had failed to examine the full circumstances before discharging the penalties imposed on Markey Drilling.

31. Specifically, Mrs Donnelly informed the Tribunal that for Markey Drilling, the only periods with payments made to subcontractors were 06/15 to 08/15, while the other periods were nil returns.

32. It is HMRC's practice to cancel any penalty for a particular period where a nil return is due. This is an internal policy by HMRC, and is not derived from any

statutory instrument. (The Tribunal understands this policy as HMRC exercising the discretionary powers conferred under s 102 TMA.)

33. For this reason, the penalties imposed on Markey Drilling for the three return periods 06/15 to 08/15 should not have been cancelled; only the penalties for the other periods with a nil return filed should have been cancelled.

34. Nonetheless, HMRC have decided to abide by the wrong decision. It does not entitle the appellant to claim that the decision for Markey Drilling created a precedent for Markey Civils, just because HMRC decided not to reverse the wrong decision.

35. As regards the penalties cancelled for Markey Civils:

(1) the penalty for 06/15 was cancelled because a nil return was made, with no payments being made to subcontractors;

(2) the cancellation of the penalty for 12/15 was wrongly determined.

Discussion

36. The principal matter for the Tribunal to determine in this appeal is whether the appellant had a reasonable excuse for filing the CIS returns late.

37. There is no dispute from the appellant that the CIS returns were filed late for 06/15 to 03/16. The first default, that of 06/15, did not incur a penalty as it was a nil return. The default penalties were imposed for the continuous periods from 07/15 to 03/16, with the exception of 12/15 which was erroneously cancelled by HMRC.

38. Our decision addresses these continuous defaults by separating them into two periods of time, the first period covers the defaults from 07/15 to 10/15, and the second covers the defaults from 11/15 to 03/16 (excepting 12/16).

The defaults in relation to 07/15 to 10/15

39. The Tribunal highlighted to Mr Boyle at the hearing that both the appellant company and Markey Drilling were required to register for CIS as from 06/15. The appellant was eventually registered for CIS on 27 October 2015.

40. The notification to HMRC of the appellant's liability to register for CIS was therefore late. It follows that the CIS returns for 06/15 to 10/15 were necessarily late, if the registration was late in the first place. No grounds have been advanced for the lateness in registration. We find therefore that there can be no reasonable excuse for the defaults for 06/15 to 10/15, following on from the fact that there was no reasonable excuse given for the late registration for CIS.

41. This point was explained to Mr Boyle at the hearing, and it seems that he has conceded that these earlier defaults are not disputable, since the appellant did not contend that it had a reasonable excuse for the late registration for CIS.

42. The penalties in relation to the defaults for 07/15 to 10/15 are therefore upheld.

The defaults in relation to 11/15 to 03/16

43. The essential ground given for the later defaults is that manual CIS forms were submitted for the appellant, and these forms were sent to HMRC office at Newry. For the following reasons, we cannot give credence to this assertion:

(1) Mr Boyle initially claimed that the manual forms were submitted on time for all the periods, including 07/15 to 10/15, until we pointed out that it was highly unlikely as regards those periods before the registration.

(2) No copies of these manual forms have been produced as part of the evidence. Some form of record must have been kept by the accountant, whether in hard copy or electronically, as part of standard business practice. Some contemporaneous records must have been available: such as schedules of payments to subcontractors, lists of offsets by the business as a contractor, client correspondence to supply details, if these manual forms were indeed contemporaneous with their respective due dates.

(3) If reliance was placed on submitting a hard copy of the monthly CIS return, and if HMRC did not supply these requisite forms in the post as was the case with the partnership, there had been no record of any communication from the appellant or its agent requesting these forms.

(4) Except for the return for 11/15, which was submitted on 28 July 2016, the CIS returns were submitted on 29 June 2016. As HMRC aver, if the figures were readily available from these manual forms, there was no explanation given for taking an additional three to four months to remedy the failure after discovering it in April 2016.

(5) There was no record of receipt of these manual forms at HMRC's Newry office, which is a satellite office and remains partly open capable of receiving mail. All these manual forms claimed to have been sent on time by the due date, every single one of them would have to go missing to result in no records of any forms having been received. This was not a one-off occurrence, but month on month for consecutive periods, not only for the appellant, but also for Markey Drilling. It is not credible that all these manual forms should have consistently failed to be delivered.

44. Where the service of a said document is in dispute, the resolution is by reference to section 7 of the Interpretation Act 1978, which relevantly provides as follows:

> "Where an Act authorises or requires any document to be served by post (whether the expression 'serve' or the expression 'give' or 'send' or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

45. The burden of proof for the deeming provision to apply is on the appellant as the sender. What is required to be proved is that the document has been: (a) properly addressed, (b) prepaid and (c) posted. If the sender can prove all these elements, then the deeming provision under the first part of section 7 can be relied upon for service

of the said document to be deemed to have been effected. It is only when part one of section 7 is engaged that HMRC will be required to prove the contrary.

46. There is no evidence whatsoever being produced by the appellant to prove the elements that are required for service to be deemed. The fact whether these manual forms were served remains in doubt. The Tribunal has to decide on the burden of proof, and on the balance of probability, we find these manual forms were not served.

47. Furthermore, we reject the assertion made by Mr Boyle that there was no correspondence from HMRC indicating that no returns have been received by them. In actual fact, numerous penalty notices have been issued:

(1) The first batch of penalty notices were issued on 28 November 2015; eight in total and were in relation to periods 07/15 to 11/15, five of which were for £100 for each default, and three of which were for £200 for the first three defaults that were late by two months. The issue date of the batch of penalty notices suggests that it was triggered by the CIS registration on 27 October 2015.

(2) Five more penalty notices of £100 were issued at near monthly intervals after each default had occurred for the periods 12/15 to 03/16.

(3) Three more penalty notices of £200 each were issued for 10/15, 11/15 and 12/15.

48. As an accountant, Mr Boyle should know that when these penalty notices were issued, they signified that HMRC's records did not show the returns as having been received. Even if the Tribunal were able to find that the manual returns were served, these numerous penalty notices would have alerted any responsible agent to make enquiry as regards whether HMRC have indeed received them.

49. As to whether the appellant had a reasonable excuse, it is "a matter to be considered in the light of all the circumstances of the particular case" (*Rowland v HMRC* [2006] STC (SCD) 536 at [18]).

50. The test for reasonable excuse 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:

> "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?"

51. Having regard to the following facts, we conclude that the appellant company did not have a reasonable excuse for the consecutive late filing of the CIS returns:

(1) The directors of the company were not new to CIS; they were partners in the predecessor business which had to account for CIS. They knew the partnership business was continued by the two new companies; they

should know that the CIS status of the partnership would have to be assumed by the new companies by registering the new companies for CIS.

(2) That registration was of itself late by 4 to 5 months; there was no explanation given as to why the registration was late.

(3) When the registration did happen on 27 October 2015, the arrears of the CIS return filing should have been dealt with at that point in time. However, as we have found, the outstanding CIS returns were not filed until many months later in June and July of 2016.

(4) Even if these manual returns were posted as claimed, their non-receipt by HMRC would have been evidenced time and time again in the serving of penalty notices on the appellant company. To take no action to remedy the situation, or to investigate why these manual returns were not delivered, was not the action of a reasonable and responsible taxpayer.

(5) The statute specifically excludes any reliance on a third party to be a reasonable excuse, unless the taxpayer had taken reasonable care to avoid the failure. Given the aforesaid, we do not consider that the directors of the appellant had taken reasonable care to avoid the failure, especially in the light of the numerous and repeated penalty notices served on the company from 28 November 2015 to 5 March 2016. The repeated failure to submit the monthly CIS returns was only remedied in June and July of 2016, which was many months after the first batch of penalty notices served in November 2015.

Decision

52. For the reasons stated, the appeal is dismissed.

53. For the periods 07/15 to 11/15, the penalties of £100 and £200 imposed on each of the five periods are confirmed.

54. For the periods 01/16 to 03/16, the penalty of £100 imposed on each of the three periods are also confirmed.

55. 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.

DR HEIDI POON
TRIBUNAL JUDGE

RELEASE DATE: 22nd MARCH 2018