



**TC01904**

**Appeal number: TC/2011/02017**

*Construction Industry Scheme – whether the Appellant meets the tests necessary to be allowed gross payment status – compliance test not met – appeal dismissed.*

**FIRST-TIER TRIBUNAL  
TAX**

**DOUGLAS FORSYTH**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL JUDGES: Peter R. Sheppard. FCIS; FCIB; AIIT  
Kenneth Mure Q.C.**

**Sitting in public at George House, 126 George Street, Edinburgh on 14 September, 2011  
and 26 January, 2012.**

**Mrs. Tracey Forsyth for the Appellant**

**Mrs. Chris Cowan, for the Respondents**

## DECISION

1. This is an appeal against a Decision by the Respondents dated 6 January 2011 refusing to grant the Appellant Gross Payment Status within the Construction Industry Scheme. The Appellant had applied for this on 17 September 2010. The Decision was confirmed in a review dated 24 February 2011.

2. The relevant legislation is:

The Finance Act 2004, sections 63 and 64, and part 1 of Schedule 11.

The Income Tax (Construction Industry Scheme) Regulations 2005.

10 Taxes Management Act 1970 Section 118.

In addition the Tribunal was referred to the following First tier Tribunal Decisions:

TC 234 *Darren Munns v HMRC* [2009] UKFTT 290 (TC)

TC 288 *Ductaire Fabrications Ltd. v HMRC* [2009] UKFTT 350 (TC)

3. Part 1 of schedule 11 of The Finance Act 2004 sets out three conditions which must be satisfied before HMRC will grant Gross Payment Status. These three conditions are the Business test, the Turnover test and the Compliance test.

4. At the hearing on 14 September 2011 the Respondents, who by agreement presented their case first, from the outset accepted that the Appellant met both the Business test and the Turnover test. They also accepted that the Appellant had submitted tax returns on time. However they considered that the Appellant failed the Compliance test because of the following four incidences of unpaid tax:

(i) The final payment for the tax year 2008/9 of £4,655.68 due on 31 January 2010.

25 (ii) The first instalment for the tax year 2009/10 of £2,327.84 due on 31 January 2010.

(iii) A surcharge for late payment of tax due for 2008/9 of 232.78 due on 6 May 2010.

(iv) The second payment for the tax year 2009/10 of £2,327.84 due on 31 July 2010.

30 5. The Respondents said that it was apparent that the Appellant would be claiming reasonable excuse for the failures because he had said in correspondence with them that he had suffered a bad debt of £40,000 as a result of the construction company Highland Quality Construction (HQC) going into administration. This had occurred in May 2010. Mr Forsyth's bank account shows a credit from HQC on 18 May 2010.

35 6. Three copy invoices issued by Mr Forsyth but unaddressed and dated between 1 April 2010 and 29 May 2010 were provided to the Tribunal. These were for £32,846 plus VAT of £4,926.90, total £37,772.90. The Respondents pointed out that these invoices all post dated the failures to pay tax due by 31 January 2010 and only

one invoice (for £8,280 plus VAT of £1,242) was dated before 6 May 2010. The Respondents said it was clear that Mr Forsyth had been finding it difficult to trade profitably for some years.

5 7. The Respondents pointed out that The Income Tax (Construction Industry) Scheme Regulations 2005 set out certain circumstances where an applicant may be treated as satisfying the conditions. One of these covers late payment of income tax but as this only permits payments made late but within 28 days of the due date they are not applicable to the Appellant.

10 8. They also said there was insufficient evidence to back up the assertion of the bad debt; the copy invoices were unaddressed and the bank statements inconclusive.

9. Mrs Tracey Forsyth appeared for her husband who was not present. Addressing the Respondents last point first she observed that one only had to search at Companies House to find that HQC was in administration. She said that she had not expected to have to prove this point but had the evidence at home to do so.

15 10. Mrs Forsyth accepted that payments had not been made on time but claimed that at a time when she and her husband were struggling financially they had suffered the further serious blow of the large bad debt referred to above. She said that she had been advised that the best she could hope for was a pay out of about £40. Because of the recession her husband had found it difficult to find work, but he had now achieved  
20 this. She was struggling to pay off the bank, the mortgage, and hire purchase payments in respect of the lorry. All of this she considered was a reasonable excuse for the delays in payment.

25 11. Mrs Forsyth said that her husband had for a period been paid gross but he had been taken off that. She said that she had the papers or e-mails at home to prove this. Mrs Cowan for the Respondents could neither confirm nor deny this.

30 12. The Tribunal was aware that the tests for removal from the Construction Industry Gross Payment Scheme are different to those for refusing an application for Gross Payment Status. In view of this and bearing in mind the serious financial situation facing Mr Forsyth the Tribunal decided to adjourn the hearing and give Mrs Forsyth one month to provide to the Tribunal the written evidence she said that she had which shows that Mr Forsyth had been given Gross Payment Status at some time in the past. It would also allow Mrs Forsyth time to provide the evidence of the bad debt. The time would also allow the respondents to clarify whether or not they had ever granted Gross Payment Status to Mr Forsyth.

35 13. Mrs Forsyth did within the one month time limit provide the Tribunal with some documentation which she considered supported her statements. The Respondents provided their written comments on those documents. A resumption of the hearing was therefore set down for 2.00pm on 26 January 2012.

40 14. About 10 days before that date. The Tribunal received an e-mail message to say that both Mr & Mrs Forsyth had been ill for a number of weeks and would not be able to attend the Tribunal and requesting a postponement. The Respondents objected to

that request on the grounds that no medical evidence had been provided. The Tribunal agreed with the Respondents view. The Tribunal Office advised the Appellant of the decision and was advised that Mrs Forsyth would try and attend.

5 15. In the event Mrs Forsyth did not attend the Tribunal and sent no explanation for her or her husband's absence, neither was any medical evidence provided. After waiting 20 minutes the Tribunal resumed the hearing with only the Respondents present.

10 16. At the resumption of the hearing Mrs Cowan said that having considered the evidence submitted by Mr Forsyth of unpaid invoices and of HQC going into administration the Respondents were prepared to accept that Mr Forsyth did have reasonable excuse for his failures to make the payments due on 6 May 2010 and 31 July 2010. However the evidence did not provide excuse for the failures to make the payments due on 31 January 2010. In addition the evidence provided did not prove that Mr Forsyth had previously been granted Gross Payment Status, in fact it  
15 tended to prove quite the opposite. Mrs Cowan said that the Respondents had checked their records and could find no application for Gross Payment Status from the Appellant prior to the one made on 17 September 2010 which was the one under consideration at the hearing. The Respondents had commenced their tests on that application on 5 October 2010.

20 17. In the Tribunal's view the documents provided by Mrs Forsyth do not confirm that Mr Forsyth had ever been granted Gross Payment Status by the Respondents. They appear to show that there had been some confusion between Mr Forsyth and his contractor as to whether or not he had Gross Payment Status and this had culminated in the contractor ascertaining that he had not. There was no evidence that the  
25 Respondents were involved in these discussions.

18. The documents did however show that HQC had gone into administration.

30 19. The large bad debt at the end of May 2010 was unforeseen by Mr Forsyth and, as his wife said, it was a serious blow to them and their family as a bad debt of that magnitude would have been to most families. In such circumstances the Tribunal considers that Mr Forsyth would not have had time to recover from such a blow by 31 July 2010 and therefore agrees with the Respondents that Mr Forsyth had reasonable excuse for his failure to pay the tax due on 31 July 2010 on time. In addition there was an invoice issued by the Appellant to HQC outstanding in May 2010 which provides a reasonable excuse for the late payment of the surcharge due on  
35 6 May 2010.

20. Unfortunately for Mr Forsyth the unpaid invoices and bad debt occurred three months after the due dates for the other two payments due on 31 January 2010. They cannot therefore be regarded as a reasonable excuse for those failures. In the case of *Darren Munns v HMRC* the Tribunal judge Mr Donald Coverdale stated:

40 "It is the Tribunal's view that cash flow problems do not by themselves amount to a reasonable excuse. It is the duty of a taxpayer to pay the tax when due."

21. Whilst cash flow problems do not by themselves amount to a reasonable excuse the reason for those problems might. Mrs Forsyth gave no reason for late payment in respect of the two 31 January 2010 failures other than general financial hardship and the current economic downturn. Therefore the Tribunal has no alternative but to dismiss the appeal.

22. 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.

**TRIBUNAL JUDGE: Peter R. Sheppard**  
**RELEASE DATE: 5 March 2012**