



TC03904

Appeal number: TC/2012/06465

Penalty for late filing of CIS return - Appellant was unable to file return on time as proprietors abroad and unable to file online - return filed by post nine days late because of 'postal problems abroad' - whether reasonable excuse - no - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

STEYNE FARM CO LTD

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 received by the Tribunal on 12 June 2012, and HMRC's Statement of Case, received on 27 March 2012, the Appellant submitting no response.

DECISION

The Appeal

5 1. Steyne Farm Co Ltd ('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 June 2011.

2. The point at issue is whether or not the Appellant has a reasonable excuse for submitting a late return.

Background

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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.

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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.

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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.

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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.

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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.

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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 November 2011. The filing date for the return was 19 November 2012.
15. The Contractor Monthly return was filed on 28 November 2011.
16. As the return was not received by the filing date, HMRC sent the Appellant a late filing penalty notice on 3 December 2011 in the amount of £100.
17. On 17 December 2011 Mr Crimes director of the Appellant appealed against the penalty, saying:
- “Unfortunately, due to the fact that we have to pay on line I was unable to send the payment until the 22nd November due to the internet being down in our area as we are out in the country.
In addition, I understand you didn't receive our return in the post. This is due to the same reason, i.e. we are out in the country and the post is as intermittent as our internet. As I was only a few days late, there is no justification for a penalty.”
18. HMRC sent the Appellant a decision letter on 8 March 2012, rejecting its appeal and offering a review.
19. On 12 March 2012 the Appellant requested a review of HMRC's decision saying:
- “Mr Crimes requested a review of HMRC's decision, stating:
I do not accept HMRC view as how can I be responsible for the internet failing and the post in our area inconsistent and unreliable. We are a small business and endeavour to pay CIS and issue our returns on time. These penalties are unnecessary and bullish conduct as we are unpaid tax collectors and you don't even put stamps on the return envelopes.
I have no funds and no will to pay any penalties and insistence will result in yourself having to bankrupt us and my employee will end up without a job”
20. HMRC carried out a review and issued their review conclusion on 18 April 2012. The outcome of the review was that HMRC's decision should be upheld.
21. On 12 June 2012, the Appellant notified its appeal to the Tribunal reiterating the earlier grounds of appeal, and saying:

5 “This penalty is unreasonable as I had posted on time. However HMRC expect me to provide proof. The only way this can happen is if I personally drive four mile to the post office and stand in a queue to have a register deliver at a cost plus the postage that I have to pay would make this a joke. We are burdened enough as unpaid tax collectors but I cannot be held responsible for the post we are now filing on line so do not envisage any further problems.”

10 Appellant’s contentions

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

HMRC’s contentions

15 23. The Appellant has been registered within the new Construction Industry Scheme since March 2008; HMRC would consider them to be an experienced contractor and fully aware of their tax obligations.

24. It is incumbent on contractors to make sure that they have adequate procedures in place to meet their tax obligations; this would include ensuring that if they reside in an area where the postal service is inconsistent or unreliable that appropriate arrangements are made so that their returns are received by HMRC on time.

20 25. 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.

26. The front of the Contractor's Monthly return and the return guidance notes contains reminders about both the filing deadlines and consequences of missing the deadlines.

25 27. Standard operating procedure on receipt of a paper return which is posted directly to the central processing office, which is the norm, is to batch all returns received per day under date header for processing.

30 28. Standard operating procedure on receipt of a paper return that has been hand delivered at a public counter or posted to a local tax office is to date stamp the return with the actual date of receipt at HMRC and forward it on for processing.

29. The date of receipt at HMRC is recorded separate to the date of processing on the CIS system.

30. CIS system records show that in this case the return due by 19 November 2011, was received by HMRC on 28 November 2011 and processed on 2 December 2011.

35 31. There is no record of a Contractor Monthly return being received for the period ending 5 November 2011 from the Appellant prior to 28 November 2011.

32. In line with Regulation 4 of Statutory Instrument 2005 No. 2045 of 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 —it is not enough simply to have posted the return in what is believed to be sufficient postage and time to reach HMRC by the 19th of the month.

33. In response to a previous appeal, an educational letter was sent to the Appellant on 19 May 2011, which clearly advised that returns should be sent using the large letter postage rate and evidence of postage would be required in cases of postal delays; however the Appellant chose to disregard this information.

34. The Appellant states that in order to provide proof of postage the return would have to be sent by registered delivery at additional cost; HMRC submit that proof of postage does not necessitate additional postage costs and in cases where the grounds for reasonable excuse are cited as postal delays or when it is contended that the return was posted in good time, it is reasonable to expect that some evidence of actual postage should be provided.

35. The pre-addressed envelope provided by HMRC is not postage-paid and as is standard procedure with most non-payment bearing pre-paid envelopes supplied by HMRC, the contractor has to bear the cost of the return postage. This cost will depend upon the weight of the return (for example, one with many pages completed will weigh more than the standard four page return) and the fact that the reply envelope, due to its shape and size, is classed by Royal Mail as a "large letter". There is a note to this effect in the stamp area of the envelope itself so that contractors are aware of the postal requirements.

36. However to assist contractors a nil return can be registered over the telephone by contacting the CIS helpline; it is reasonable to expect that the Appellant being (a) registered within the new CIS scheme since March 2008, (b) advised via previous education letter and (c) as this information is shown on the front of each return, would be fully aware of this service.

37. As in this case the return due was a nil return, the Appellant knowing that the postal service in their area was unreliable could have registered the return over the telephone, but chose not to do so.

38. Although the Appellant has now switched to online filing for the period ending 5 April 2012 onwards, this cannot be deemed a reasonable excuse for its failure to file the return for the relevant period.

39. HMRC can only act in accordance with legislation; possible effect on future trade is not relevant. This is a commercial consideration, which is not addressed in either the penalty or appeal legislation.

40. Although HMRC can sympathise with regard to the difficulties experienced within the current financial climate a failure has been made 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.

41. The penalty was imposed in accordance with legislation as the return was filed late. The penalty is not to compensate HMRC for lost or late paid tax.
- 5 42. 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.
- 10 43. 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.
- 15 44. 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.
- 20 45. Furthermore, in the case of *Anthony Bosher 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.
- 25 46. 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 so resulted in the imposition of the penalty.
- 30 47. 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.
- 35 48. 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.
- 40 49. 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*).
50. HMRC have considered the special reduction regulations but their view is that there are no special circumstances which would allow a reduction in the penalty.

Conclusion

51. 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.

52. 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.

53. 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 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.

54. 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. Furthermore if there is in fact a reasonable excuse it must exist throughout the failure period.

55. The Appellant says that he was unable to pay on-line and that HMRC did not receive their postal return because of problems with postal delivery. The Appellant argues that there is no justification for the penalty because it was only a few days late.

56. 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 Appellant must have been aware of the problems with online or postal filing. In the absence of any further 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.

57. The Tribunal must therefore conclude 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.

5 58. 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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**MICHAEL S CONNELL
TRIBUNAL JUDGE**

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RELEASE DATE: 11 August 2014

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